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In the
Supreme Court of the United States
October Term, 1996

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC.; STEVEN M. BROWN; EVE BROWN; and HILLARY BROWN; and on behalf of a class of children in the State of Ohio similarly situated,

Petitioners,

vs.

Betty Montgomery,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Amendment bars an action against a state's attorney general for prospective declaratory and injunctive relief challenging the constitutionality of a law that removes a class of children from the protection of criminal child endangerment laws based upon the religious belief of the parent.

PARTIES TO THE PROCEEDING

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There are no parent companies or wholly owned subsidiaries of any party to be listed.

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JURISDICTIONAL STATEMENT

The Sixth Circuit decision was filed on August 5, 1996. The petition for rehearing en banc, which was treated as a petition for rehearing, was denied on September 20, 1996. This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1254(1994).

PROVISIONS OF CONSTITUTION AND STATUTES INVOLVED

Article VI to the Constitution of the United States is reprinted in the appendix at 45a. Amendment XI to the Constitution of the United States is reprinted in the appendix at 45a. Amendment XIV to the Constitution of the United States is reprinted in the appendix at 45a. Amendment I to the Constitution of the United States is reprinted in the appendix at 45a.

28 U.S.C. § 2201 is reprinted in the appendix at 46a. 28 U.S.C. § 1343 is reprinted in the appendix at 46a.

Ohio Revised Code § 2919.22(A) (1993 Supp. 1995), Ohio Revised Code § 2151.03(B) (1994), O.R.C. § 2151.42 (1963), O.R.C. § 2151.03 (1963), O.R.C. § 109.02. § 109.14, O.R.C. § 109.16, O.R.C. § 109.51, O.R.C. § 109.71, O.R.C. § 309.08, and O.R.C. § 309.15 are reprinted in Appendix G, App. 47a-51a.

STATEMENT OF THE CASE

In 1969 the State of Ohio enacted a provision in its criminal code specifically withdrawing the protection of the criminal law against child neglect or mistreatment, from a class of children who were "under spiritual treatment through prayer in accordance with the tenets and practices of a well-recognized religion." O.R.C. §§ 2151.03 and 2151.42 (1969), reprinted in the Appendix, *infra*, at 48a-49a. Subsequent amendments and recodification resulted in two current Ohio statutes to substantially the same effect, O.R.C. §§ 2919.22(A) (1993 Supp. 1995) and 2151.03(B) (1994).[1]

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[1] The sections of Ohio statutes at issue here are the following italicized portions of:

> **O.R.C. § 2919.22 Endangering children.**
>
> (A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. *It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.* (Effective 1-1-74); and

In 1994, the petitioners commenced the instant class action in the United States District Court for the Southern District of Ohio, as representatives of the class of Ohio children who are in the care of parents and custodians who practice spiritual treatment through prayer in lieu of reasonable medical care. Jurisdiction in the district court is founded upon 28 U.S.C. §§ 1343 and 2201. Petitioners are Eve Brown and Hilary Brown, two minor children in the custody of a parent who provides Christian Science spiritual treatment upon them in lieu of reasonable medical care to treat their illnesses, including Eve Brown's congenital kidney disease.

Petitioners seek prospective declaratory and injunctive relief, alleging that the statutes violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Establishment Clause of the First Amendment. The petitioners allege that the statutes 1) encourage parents and caretakers to withhold needed medical care, thereby endangering their health and lives, 2) withdraw the protection of the state's criminal laws intended for their protection, 3) impose disparate duties of child protection on parents, and 4) impermissibly use religious beliefs as a classification for their disparate treatment. Second Amended Complaint, App. at 52a; Swan Affidavit, App. at 68a; Brown Affidavit, App. at 119a; Myers Affidavit, App. at 114a.

O.R.C. § 2151.03 Neglected child defined; failure to provide medical care for religious reasons.

***

(B) Nothing in this chapter shall be construed as subjecting a parent, guardian, or custodian of a child to criminal liability when, solely in the practice of his religious beliefs, he fails to provide adequate medical or surgical care or treatment for the child. (The full text of O.R.C. § 2151.03 is reprinted in the Appendix, *infra*, at .)

The defendants named are the Ohio Attorney General, the county criminal prosecutor, and city solicitor, as criminal prosecutors. The Ohio Attorney General is a criminal prosecutor, both under O.R.C. § 109.16, App. at 50a, and at common law. *Brown v. Concerned Citizens for Sickle Cell Anemia, Inc.*, 56 Ohio St. 2d 85, 10 O.O. 3d 220, 382 N.E.2d 1155 (1978). She is "the chief law officer for the state and all its departments..." O.R.C. §109.02. App. at 49a. Her duties include appellate prosecution of criminal offenses. O.R.C. §309.08. App. at 51a. She is required to prosecute any person indicted for a crime upon the written request of the governor. O.R.C. §109.02. App. at 49a. Within the office of the Attorney General is the Bureau of Criminal Identification and Investigation, which aids law enforcement officers in solving crimes and controlling criminal activity. O.R.C. §109.51. App. at 50a. Also within the office of Attorney General is the Ohio Peace Officer Training Council, which assures the effective training of law enforcement officers throughout the state. O.R.C. §109.71. App. at 50a-51a. County prosecuting attorneys are required annually to apprise her in detail of criminal prosecutorial activity. O.R.C. §309.15. App. at 51a. She is required to counsel a prosecuting attorney with regard to any suit, whether actual or prospective, involving the state. O.R.C. §109.14. App. at 49a. When requested by the governor or the general assembly, she is required to appear for the state in any court or tribunal in which the state is directly interested pursuant to O.R.C. §109.02. She is required to appear for the state in the supreme court in all criminal cases in which the state is directly *or indirectly* interested. *Id.*

The defendants moved to dismiss the action on the basis of Eleventh Amendment immunity, and lack of standing and ripeness. In response, petitioners filed affidavits to supplement the complaint. App. H, at 52a-124a. The district court held

that petitioners had standing, noting the deaths of many children who were denied medical care due to their parents religious beliefs, so that the threat of injury to them is real and they do "not have to await consummation of the threatened injury to seek relief." *Children's Healthcare v. Deters*, 894 F.Supp 1129, 1133, App. at 36a-37a. Further, the court found that causation had been shown because the "act ... is self-enforcing, because it does not require active participation or enforcement by state officers. The statute itself causes the immediate threat of injury." *Id.*, at 1133, App. at 38a. Further, the court held that the action was not barred under the Eleventh Amendment noting why claims for prospective injunctive relief are proper against state officials, quoting from *Ex parte Young*:

> "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity."

Id., at 1134, App., at 40a. The district court dismissed the county and city criminal prosecutors as unnecessary parties "because the Attorney General will represent the interests of the state." *Id.*, at 1131, App., at 33a. The Attorney General appealed from the interlocutory order denying her motion.

The Sixth Circuit Court of Appeals reversed the district court and ordered dismissal of the action on three grounds. First, the court held that *Ex parte Young* did not allow an injunction against a state official for the type of statute involved here, because "[w]hat we have here is not action but inaction and *Young* does not apply," apparently relying on *1st Westco Corp. v. School Dist. of Philadelphia*, 6 F.3d 108 (3d Cir. 1993), *Kelly v. Metropolitan County Bd. of Educ.*, 836

F.2d 986, 990-91 (6th Cir. 1987), and *Sperry-Hutchinson Co. v. Kuhn*, 212 F. 555 (E.D.Mich. 1912). *Children's Healthcare v. Deters*, 92 F.3d 1412, 1415-16, App. at 6a, 9a.

Second, the Sixth Circuit held that the action does not fall within the *Young* exception "because the plaintiffs do not seek to enjoin the enforcement of an allegedly unconstitutional statute," reasoning that "*permit[ting]* a broader enforcement of certain statutes ... would turn *Young* inside out." *Id.*, at 1416, App. at 10a.

Third, the court held that "Ohio law delegates the enforcement of the challenged statutes to local prosecutors, not the Attorney General, ... [who] has no connection to the enforcement of the statutes," relying again on *1st Westco Corp., supra*, and ignoring the decision of the highest state court of Ohio that the Ohio Attorney General retains all powers of a common law attorney general, and ignoring O.R.C. § 109.16, and the various provisions of Ohio statutes conferring criminal law authority on the Ohio Attorney General. *Id.*, at 1416-17, App. at 10a. The Sixth Circuit refused to consider whether petitioners' claim for declaratory relief was similarly barred by the 11th Amendment.

Because the questions are important, conflict with decisions of this Court, and are certain of recurrence, the petitioners now request that this Court grant certiorari to review the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

This case provides the Court with an important opportunity to determine the scope of the Eleventh Amendment's application to prospective relief actions against state officials to adjudge the unconstitutionality of state statutes. The Sixth Circuit's decision denies relief under the Federal Declaratory Judgment Act and the *Ex parte Young* exception unless the state official being sued has threatened

enforcement or is about to commence proceedings under the challenged statute. This "action" requirement is appropriate in cases where the plaintiff challenges a prohibitory or regulatory statute, however, where the statute denies the protection of general laws from a class of persons by requiring government inaction, this requirement improperly erects an impenetrable Eleventh Amendment barrier against the federal forum.

This new requirement by the Sixth Circuit for prospective relief claims challenging state statutes under the Fourteenth Amendment is contrary to this Court's decisions and has the far-reaching effect of consigning petitioners as a class, and others with similar claims, to the state courts for vindication of federal rights in derogation of the federal court's "primary obligation to protect the rights of the individual that are embodied in the Federal Constitution." *Harris v. Reed*, 489 U.S. 255, 267 (1989) (Stevens, J., concurring). As a result, petitioners and other plaintiffs seeking federal declaration of their constitutional rights for official inaction will be left with only the remedy of certiorari in this Court. Forty-eight states have created exemptions from their civil or criminal child welfare laws for children whose parents are practicing spiritual treatment to treat their illnesses. These claims are too substantial, and too commonplace, for this result to be countenanced.

Under Ohio law, petitioners children are not protected against criminal child abuse, neglect, endangerment, or even manslaughter, similar to the laws this Court struck down in *Romer v. Evans*, 517 U.S. __, 116 S.Ct. 1620, 1628 (1996). *See, Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, __U.S. __, 116 S.Ct. 2519 (1996). A decision holding that such exemptions cannot be challenged absent a state official's action to enforce those laws, consigns these children to grave risk of harm, without recourse to any inferior federal court. The Sixth Circuit's decision assures that

Eleventh Amendment immunity under this type of statute will be a recurring issue which needs to be settled by this Court.

I. THE ISSUE OF FEDERAL COURT JURISDICTION IN CASES OF CRIMINAL LAW EXEMPTIONS IS AN IMPORTANT ONE WHICH IS CERTAIN TO RECUR.

The Sixth Circuit's decision has deprived petitioners of a federal forum to obtain prospective declaratory and injunctive relief to invalidate an unconstitutional state statute. The pervasiveness of the litigation over these and similar statutes, both criminal and civil, assures that the issue of federal court jurisdiction to determine the constitutional rights of children under these and similar statutes will be recurring and ought to be settled by this Court.

Medical neglect of children is a problem that has been exacerbated by the widespread enactment of state legislation withdrawing the protections of criminal[2] and civil[3] law from

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[2] Ohio is only one of 32 states which have specific exemptions from criminal liability for parents who withhold medical care from children on religious grounds. *See* Ala. Code § 13A-13-6(b); Alas. Stat. § 11.51.120; Ark.Code Ann. § 5-10-101(a)(9); Cal. Penal Code §270; Colo. Rev. Stat. § 18-6-401; Del. Code Ann. Title 11, § 1104; Del. Code Ann. Title 11, § 1103(b); *Hermanson v. State*, 604 So.2d 775 (Fla. 1992)(existence of exemption in civil code created confusion which precluded criminal prosecution on due process grounds); Ga. Code Ann. § 16-12-1; Idaho Code § 18-1501(3); Idaho Code § 18-401(2); Ind. Code § 35-46-1-4; Ind. Code § 35-46-1-5; Iowa Code § 726.6; Kan. Stat. Ann. § 21-3608(1)(c); La. Rev. Stat. Ann. § 14:93(b); La. Rev. Stat. Ann. § 14:403(b)(5); Me. Rev. Stat. Ann. Title 17A, § 557; Minn. Stat. § 609.378; Mo. Rev. Stat. § 568.050(4)(2); Mo. Revised Statutes 568.040(2)(4); N.H. Rev. Stat. Ann. § 639:3; N.J. Stat. Ann. § 2C:24-4; N.J. Stat. Ann. § 9:6-1.1; N.Y. Penal Law § 260.15; N. C. Gen. Stat. § 14-316.1; Ohio Rev. Code Ann. § 2919.22a; Okla. Stat. Ann. Title 21, § 852; Okla. Stat. Ann. Title 21, § 852.1; Ore. Rev. Stat. § 163.206; Ore. Rev. Stat. § 163.555; Ore. Rev.

Stat. § 163.115(5)(b); S. C. Code Ann. § 20-7-50; S. C. Code Ann. § 20-7-60; S. D. Stat. § 25-7.17.1; Tenn. Code Ann. § 37-1-157(c); Tex. Penal Code § 22.04(k); Utah Code Ann. §76-5-110; Va. Code Ann. § 18.2-371.1(B); W.Va. Code § 61-8D-2; W.Va. Code § 61-8D-4; Wis. Stat. Ann. § 948.03(6).

[3] Ohio is only one of 45 states which have exemptions from civil child protection laws. *See* Ala. Code § 26-14-3; Alas. Stat. § 47.17.020(d); Ala. Stat § 47.10.085; Ariz. Rev. Stat. § 8-531.01; Ariz. Rev. Stat. Ann. § 8-546(b); Ark. Stat. §12-12-512; Cal. Wel. & Inst.Code §16509.1; Cal. Wel. & Inst. Code § 16509; Colo. Rev. Stat. § 19-3-103; Conn. Gen. Stat. Ann. § 46b-120; Conn. Gen. Stat. Ann. § 17a-104; Del. Code Title 10 § 901(11); Del. Code Title 16 § 907; D. C. Code Ann. § 2-1356 (1981); Fla. Sta. § 415.503; Fla. Stat. § 39.01(37); Ga. Code § 15-11-2(8); Ga. Code § 49-5-180(5); Idaho Code § 16-1602(t)(1); Idaho Code § 16-1616(c); Ill. Rev. Stat. Ch. 23 § 2053; Ill. Con. Stat. Ch. 325 § 5/4; Ind. Code § 31-6-4-3(d); Ind. Code § 31-6-4-3(e); Iowa Code § 232.68(2)(c); Iowa Code § 255.10; Iowa Code § 281.8, unnumbered par. 3; Kan. Stat. Ann. § 38-1502(b); Kan. Stat. Ann. § 38-1513(a)(2); Ky. Rev. Stat. § 600.020(1); Ky. Rev. Stat. § 610.310(2); La. Children's Code Art. 603(14); La. Children's Code Art. 403(B)(4)(14); La. Children's Code Art. 603(13)(b); La. Children's Code Art. 1003(8); La. Children's Code Art. 1003(10)(b); Me. Rev. Stat. Ann., Title 22, § 4010(1); Me. Rev. Stat. Ann. Title 22, § 4010(2); Md. Code § 3-801(e)(2); Mich. Comp. Laws, § 722.634(14); Minn. Stat. § 626.556(2)(c); Minn. Stat. § 626.556(6); Miss.Code § 43-21-105(1)(i) and (m); Mo. Rev. Stat. § 210.115(3); Mo. Rev. Stat. § 211.031; Mo. Rev. Stat. § 211.181; Mont. Code § 41-3-102(3)(b); Rev. Stat. of Neb. § 432B.020(2); Nev. Rev. Stat. § 200.5085; Nev. Rev. Stat. § 128.06; Nev. Rev. Stat. § 128.013(2); N.H. Rev. Stat. § 169-C:3(XIX)(c); N.J. Rev. Stat. §C.9:6-8.21; N.M. Stat. § 32A-4-2(C)(5); N.C. Gen. Stat. § 7A-517(21); N.D. Cent. Code § 50-25.1-05.1(2); Okla. Stat. Title 21 § 846.1-3; Okla. Stat. § 21.1101.b.1; Ore. Rev. Stat. § 419.B.005(1)(f); Pa. Con. Stat., Title 23, § 6303(B)(3); R.I. Gen. Laws § 40-11-15; S.C. Code § 20-7-490(C); Tenn. Code § 37-1-157(c); Utah Code § 78-3a-19.5; Vt. Stat., Title 33, § 4912(3)(C); Va. Code § 16.1-228; Va. Code § 63.1-248.2; Rev. Code of Wa. § 13.34.030(4)(a); Rev. Code of Wa. § 26.44.020(3); Rev. Code of Wa. §

children whose parents have religious objections to medical care. Across the United States parents have justified withholding of necessary medical care by citing religious exemption statutes.[4] The district court correctly recognizes that the result for the child is often death. 894 F.Supp. 1129, 1133. App. at 36a-37a.

State courts are split on application of the federal law of due process to the prosecution of parents under manslaughter statutes when other portions of the state's laws have exemptions for spiritual treatment.[5] In addition, there has been a wealth of scholarly writing arguing that these

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72.05.200; Wis. Stat. § 48.981(3)(c)(4); Wyo. Stat. § 14-6-201(xvi)(A); Wyo. Stat. § 14-3-202(a)(vii).

[4] *See, People in re Interest of D.L.E.*, 645 P.2d 271 (Colo. 1982); *People v. Lybarger*, 700 P.2d 910 (Colo. 1985), appeal after remand, 790 P.2d 855 (Colo.App. 1989), rev. by *Lybarger v. People*, 807 P.2d 570 (Colo. 1991); *Matter of Jensen*, 54 Or.App. 1, 633 P.2d 1302 (1981); *Hall v. State*, 493 N.E.2d 433 (Ind. 1986); *State v. Lockhart*, 664 P.2d 1059 (Okla.Crim. 1983); *Hermanson v. State*, 604 So.2d 775 (Fla. 1992); *State v. McKown*, 475 N.W.2d 63 (Minn. 1991); *State v. Bergman*, 486 N.E.2d 653 (Ind.App. 1985); *State v. Funkhauser*, 763 P.2d 695 (Okla.Crim.App. 1988); *State v. Winkelman*, Nos. CR857 and CR858 (Huntington Co. Sup. Ct., Ind. 1987); *Commonwealth v. Barnhart*, 345 Pa.Super. 10, 497 A.2d 616 (1985), *appeal denied*, 517 Pa. 620, 538 A.2d 814 (1988), *cert. den.*, 488 U.S. 817 (1988); *Commonwealth v. Twitchell*, 416 Mass. 114, 617 N.E.2d 609 (1993).

[5] *Cf., e.g., Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989) (no due process violation for manslaughter prosecution of parent in spite of penal code exemption for spiritual treatment) with *State v. McKown*, 475 N.W.2d 63 (Minn. 1991) (manslaughter prosecution of parent violates due process because of spiritual treatment exemption in penal child abuse statute), and *Hermanson v. State*, 604 So.2d 775 (Fla. 1992) (existence of exemption in civil code created confusion which precluded manslaughter prosecution of parent on due process grounds).

exemptions endanger children, including articles that show these exemptions to be unconstitutional.[6]

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[6] Dwyer, James, *The children we abandon: religious exemptions to child welfare and education laws as denials of equal protection to children of religious objectors*, 74 Univ. of North Carolina Law Review 1321 (June 1996); Massie, Ann, *The religion clauses and parental health care decisionmaking for children: suggestions for a new approach*, 21 Hastings Constitutional Law Quar. 725-75 (1994); Monopoli, Paula, *Allocating the costs of parental free exercise: Striking a new balance between sincere religious belief and a child's right to medical treatment*, 18 Pepperdine L. Rev. 319 (1991); Abraham, Henry J., *Abraham, Isaac and the state: faith-healing and legal intervention*, 27 Univ. of Richmond Law Review 951-87 (1993); Anderson, Charles-Edward, *When faith-healing fails*, 75 ABA Journal 22-23 (July 1989); Anderson, Janet J., *Capital punishment of kids: when courts permit parents to act on their religious beliefs at the expense of their children's lives*, 46 Vand. L. Rev. 755-77 (1993); Bottoms, Bette, *In the name of God: a profile of religion-related child abuse*, 51 Journal of Social Issues 85-111 (1995); Bullis, Ronald K., *The spiritual healing 'defense' in criminal prosecutions for crimes against children*, 70 Child Welfare 541-55 (September-October 1991); Chambers, Marcia, *Deliberating faith, law and a life*, National Law Journal 13-14 (2 July 1990); Coalition to Repeal Exemptions to Child Abuse Laws, *Death by Religious Exemption*, Boston, Mass. Comm. for Children and Youth, 1991; Cohn, Jordan, *When God is the doctor*, 31 Student Lawyer 6 (February 1987); Curriden, Mark, *Blood, the Bible and the law*, ABA Barrister Magazine 13-15, 41-2 (Fall 1990); Flowers, Ronald B., *Withholding medical care for religious reasons*, 23 Journal of Religion and Health 268-82 (1984); Gathings, John T., Jr., *When rights clash: the conflict between a parent's right to free exercise of religion versus his child's right to life*, 19 Cumberland Law Review 585-616 (1988-89); Gekas, JoAnna, *California's prayer healing dilemma*, Hastings Constitutional Law Quarterly 14 395-419 (1987); Gevitz, Norman, *Christian Science healing and the health care of children*, 34 Perspectives in Biology and Medicine 421-38 (Spring 1991); LeClair, Donna K., *Faith-healing and religious-treatment exemptions to child endangerment laws: should parental religious practices excuse the failure to provide necessary medical care to children*? 13 U. Dayton L. Rev. 79 (1987); Malecha, Wayne, *Faith healing exemptions to child protection laws: keeping the faith versus medical care for children*, 12.2

The children who are discriminated against by these statutes have no effective forum for relief other than the federal court. There are two known state court prosecutions of parents in Ohio for causing death by withholding medical care for religious reasons: *State v. Miskimens*, 490 N.E.2d 931 (Ohio Com. Pl. 1984) and *State v. Miller*, slip op. 86-CRM-30, Mercer County Com. Pl., Apr. 27, 1987 (See attachment to Complaint, R. 1.) Each court recognized the limited effect of its decision that the statute was unconstitutional because of limits on its jurisdiction, and pleaded for correction of its effects on the care of children.

Journal of Legislation 243-63 (1985); Massachusetts Committee for Children and Youth, *Jeopardizing Children's Lives: a Policy Report on the Need for the U.S. Dept. of Health and Human Services to Require Repeal of Religious Exemptions to Medical Care for Children*, 1994; Merrick, Janna, *Christian Science healing of minor children: spiritual exemption statutes, first amendment rights, and fair notice*, 10 Issues in Law and Medicine 321 (1994); Plastine, Laura, 3 Seton Hall Const. L.J. (spring 1993); Rosato, Jennifer, *Putting square pegs in a round hole: procedural due process and the effect of faith-healing exemptions on the prosecution of faith-healing parents*, 29 Univ. of San Francisco Law Review 43-119 (1994); Scheiderer, Judith, *When children die as a result of religious practices*, 51 Ohio St. L.J. 1429 (1990); Semanson, Christine, *Walker v. Superior Court: a question of faith?*, 1 Detroit College of Law Review 263-81 (1989); Swan, Rita, *Discrimination de jure: religious exemptions for medical neglect*, 7 APSAC Advisor 35-8 (1994); Swan, Rita, *Children, Medicine, Religion, and the Law*, 44 Advances in Pediatrics (1997) in press; Tavolaro, K.B., *Effectively and efficiently protecting children in faith-healing cases: a proposed statutory revision for state intervention*, 10 Medicine and Law 311-25 (1991); Trahan, Jennifer, *Constitutional law: parental denial of a child's medical treatment for religious reasons*, 1989 Ann. Surv. Am. L. 307; Treene, Eric W., *Prayer-treatment exemptions to child abuse and neglect statutes, manslaughter prosecutions and due process of law*, 30 Harv. J. on Legis. 135 (1993); Walter Wadlington, *Medical decisionmaking for and by children: tensions between parent, state, and child*, University of Illinois Law Review 311-36 (1994).

The Mercer County, Ohio Court of Common Pleas stated in its decision: "It is the hope of this Court that these types of cases will not have to be pursued by the prosecution in the remaining eighty-six counties." *State v. Miller, id.*

Because the effect of referring the children to the state courts means either the commencement of 86 separate declaratory judgment actions, one in each of the counties of Ohio, or testing the statutes in criminal cases where a child has died or become seriously injured, the issue of federal court jurisdiction is an important one, certain of recurrence, and it should be settled by this Court.

II. THE SIXTH CIRCUIT'S DECISION BARRING CHALLENGES TO A STATE STATUTE UNLESS A STATE OFFICIAL HAS ACTED, CONFLICTS WITH THE FEDERAL DECLARATORY JUDGMENTS ACT AND RELEVANT DECISIONS OF THIS COURT.

This case presents an important federal question of the scope of the Federal Declaratory Judgments Act, 28 U.S.C. § 2201, and the *Ex parte Young*, 209 U.S. 123 (1908), restrictions on the Eleventh Amendment, in facial challenges to state statutes. By its decision which announces a new legal test for the application of *Young*, the Sixth Circuit has ignored the decisions of this Court declaring specific Congressional intent under the Federal Declaratory Judgments Act to restrict the Eleventh Amendment by conferring jurisdiction on federal courts in cases challenging state statutes which meet the requirements of Article III.

While the Eleventh Amendment is based upon state sovereign immunity, "government officials enjoy no such constitutional recognition." *Seminole Tribe of Florida v. Florida*, __U.S.__, 116 S.Ct. 1114, 1131 n. 15 (1996). Under *Ex parte Young* the federal court may issue "prospective

injunctive relief in order to end a continuing violation of federal law." *Id.*, at 1132 (citing *Green v. Mansour*, 474 U.S. 64 (1985)(internal quotes omitted). The Sixth Circuit's "action" requirement appears to be wholly irrelevant to the sovereign immunity basis of the Eleventh Amendment.

Because of its importance, this Court has twice taken the occasion to elaborate the history of the Federal Declaratory Judgment Act and *Young* as specific exceptions to the Eleventh Amendment. It did so first in *Perez v. Ledesma*, 401 U.S. 82 (1971), and again three years later in *Steffel v. Thompson*, 415 U.S. 452 (1974). The passage of a generation has not diminished this Court's jurisprudence, and it has been consistently followed throughout the circuits until now.

This Court has made it clear that one of the purposes of the Federal Declaratory Judgments Act enacted after the controversial *Young* decision, was to relieve plaintiffs of the burden of establishing the prerequisites to equitable relief necessary under *Young*:

> "Furthermore, plaintiffs were dissatisfied with [the *Young*] method of testing the constitutionality of state statutes, since it placed upon them the burden of demonstrating the traditional prerequisites to equitable relief -- most importantly, irreparable injury.
>
> ***
>
> That Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction and to be utilized to test the constitutionality of state criminal statutes in cases where injunctive relief would be unavailable is amply evidenced by the legislative history of the Act[.]

Steffel, 415 U.S. at 466.

\Contrary to what the Sixth Circuit has now decided, declaratory judgment is appropriate if the case-or-controversy requirements of Article III are met, if the narrow special factors warranting federal abstention are absent, and if the declaration will serve a useful purpose in resolving the dispute. *Perez*, 401 U.S. at 121-22.

Because the petitioners' action meets the requirements for declaratory judgment jurisdiction, the 11th Amendment does not prohibit the action. The Sixth Circuit's decision amounts to defiance of the congressional mandate which requires review by certiorari.

A. The Court Should Grant Certiorari to Resolve the Conflicts With This Court's Decisions Upholding Article III Justiciability in the Absence of Actual or Threatened Enforcement.

The Sixth Circuit's primary basis for its decision, namely that the *Young* exception does not apply because the Attorney General did not threaten to commence nor was about to commence proceedings against the petitioners, is really a disguised standing requirement under the rubric of the *Young* exception. It fails in this case because plaintiffs have standing, and this challenge to a state criminal statute is justiciable under Article III.

In numerous cases, this Court has held that a facial challenge to a state statute is justiciable even in the absence of actual or threatened enforcement. *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Doe v. Bolton*, 319 F.Supp. 1048 (D.C.Ga.1970), *aff'd* 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

Furthermore, a state's attorney general is a proper defendant in a challenge to a criminal statute. In *Doe*, the

attorney general's authority to represent the state in any civil or criminal case when required by the governor, his duty to give advisory opinions to the governor, and his position as the head of the Georgia Department of Law, which vested him with authority and jurisdiction in all matters of law relating to governmental departments, boards and agencies, was a sufficient connection to a challenged criminal law to establish justiciability. *Doe*, 319 F.Supp. at 1051, *aff'd* 410 U.S. 179.

Similar connections exist between the Ohio Attorney General and the enforcement of the exemptions at issue in this action. As a criminal prosecutor with authority to commence or not commence prosecutions, and to dismiss or continue prosecutions already commenced, her prosecutorial discretion is significantly affected by the statutes at issue. In addition, her authority to train peace officers, operate the Bureau of Criminal Identification and Investigation, give advice to local prosecutors, advise the governor, and represent the state, are all significantly affected by the existence of the statutes. *See, supra*, at 3-4.

The Sixth Circuit has itself held that where a statute is self-enforcing, an action against a state official who has some enforcement authority such as the governor is justiciable, and the Eleventh Amendment does not bar the action. *Allied Artists Picture Corporation v. Rhodes*, 473 F.Supp. 560 (S.D. Ohio 1979), *on reexamination*, 496 F.Supp. 408 (1980), *modified on other grounds*, 697 F.2d 656 (6th Cir. 1982). Other circuits have held that an attorney general is an appropriate defendant in a challenge to a criminal statute. *Shell Oil Co. v. Noel*, 608 F.2d 208, 212 (1st Cir. 1979). Neither the Sixth Circuit nor the respondent have cited any decision from any court holding that an attorney general is an improper party to an action challenging a criminal statute.

The Sixth Circuit asks the impossible of plaintiffs. It is simply not possible for these or any other plaintiffs to demonstrate "action" or "threatened enforcement" on the part

of the Attorney General with regard to an exemption from the child protection laws. An exemption is enforced, by its very nature, through government inaction. To require a government official's action in a suit challenging an exemption is, in effect, to require the government to violate the letter of the law, and threaten prosecution of those whom the law says they may not prosecute, in order for the plaintiffs to withstand the Eleventh Amendment bar.

Aside from its irrelevance to considerations of sovereign immunity, the whole point of requiring "action" on the part of the government official by way of proof of threatened prosecution is to establish some connection between the plaintiff and the statute they seek to challenge, i.e. a standing requirement. It prevents plaintiffs from challenging laws with which they disagree, but that do not directly affect them. This rule serves the legitimate purpose in connection with prohibitory statutes -- but is inapt to an exemption. The string of lower court cases relied upon by the Sixth Circuit for the "action/inaction" requirement, 92 F.3d at 1415, App. at 6a, all dealt with prohibitory or regulatory statutes, where such a requirement was necessary to establish the connection between the plaintiff and the challenged statute. Here, the petitioners have established standing by the direct effects of the exemption on them, *see infra*, and there is no need to establish a further connection.

B. The Petitioners Undoubtedly Have Article III Standing.

Under equal protection analysis, when government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the disadvantaged group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in

fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, __U.S.__, 113 S.Ct. 2297, 2303 (1993) (equal protection challenge to denial of right to compete for the construction contracts on a fair and equal footing does not require the plaintiff show that it would have obtained a contract but for the ordinance.)

While no child in Ohio (or any other state) can take for granted that the state will prosecute every offense, the petitioner children do not receive the same opportunity for prosecutorial protection as children of nonreligious parents. This fundamental denial of equal protection is similar in effect to Amendment 2 to the Colorado Constitution struck down by this Court in *Romer v. Evans, supra.* As in *Romer*, the challenged exemption causes injury to the excluded class, and in both cases, a favorable decision will redress the plaintiffs' discrete equal protection injury. It will not necessarily result in state prosecutions, nor will it cure all the harms alleged, only those caused by the exemption.

Here, the required connection between the petitioners and the law they seek to challenge is fully extant. Petitioners are directly adversely affected by the exemption, and this fully satisfies the requirements for a case or controversy. Petitioners have presented significant evidence that they are specifically targeted by the challenged statutes for disparate treatment, that the statutes encourage neglect, and the statutes withdraw the protection of the criminal law from them, all on the basis that the parent has certain religious beliefs. Appendix H, App. at 52a-124a. Their interests are sufficiently adversely affected to confer standing on them.

C. The Sixth Circuit's Action Requirement is Contrary to Long Standing Precedent of this Court that Inaction By a Government Official is Not Immune Under the Eleventh Amendment.

The *Young* exception to the Eleventh Amendment has been applied by this Court in the case of a government official's inaction as well as his action. In *Edelman v. Jordan*, 415 U.S. 651 (1974) the state defendants failed to act upon the plaintiff's application for disability benefits within the time required by federal regulations. This Court upheld the prospective portion of the district court's order requiring the state officials' future conduct to conform to federal regulations under the *Young* exception. *Id.*, at 664.

The holding in *Edelman* was reaffirmed in *Quern v. Jordan*, 440 U.S. 332 (1974) under the same facts, where this Court upheld the district court's prospective mandatory injunction requiring the defendants to send an explanatory notice to members of the plaintiff class explaining the procedures for administrative review of their claims. Under the Sixth Circuit's decision, an action for a mandatory injunction will never be appropriate because the inaction by the government official invokes the Eleventh Amendment bar.

The Sixth Circuit's declaration that only where officials have acted does the federal court have jurisdiction, would have sweeping pernicious effects. This Court has made it clear that state officials may be in violation of constitutional rights when they fail to act. In *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979), this Court affirmed the district court and court of appeals findings that the Columbus Board of Education never actively set out to dismantle a segregated education system. This Court held that the state officials were "under a continuous constitutional obligation to disestablish its dual school system and that it has failed to discharge this duty." *Id.*, at 458. *Accord, Green v. County School Board,*

391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1970); *Missouri v. Jenkins*, 495 U.S. 33 (1990) (cost of assuring prospective remedial measures not barred by Eleventh Amendment.)

Further, the Sixth Circuit's action requirement calls into question whether a federal district court may ever enforce its orders requiring action to correct constitutional violations. In *Hutto v. Finney*, 437 U.S. 678 (1978) this Court reaffirmed the federal court's prospective remedy under *Young* and affirmed the imposition of additional attorney's fees on state officers for failing to act, as ancillary to the federal court's power to impose injunctive relief. Under the Sixth Circuit's new test, the state official's inaction in failing to comply with a court order would deprive the district court of jurisdiction under the Eleventh Amendment.

Because of the wide-sweeping effects of the Sixth Circuit's decision on the duties of government officials to act to correct constitutional violations, certiorari should be granted to settle this important principle.

D. The Sixth Circuit's Decision Based Upon a Mischaracterization of the Relief Requested by Petitioners Requires the Exercise of This Court's Supervisory Powers.

By holding that "plaintiffs do not seek to *enjoin* the enforcement of an allegedly unconstitutional statute," 92 F.3d at 1416, App. at 10a, the Sixth Circuit attempts to shoehorn the case into one of exclusively injunctive relief so that it can distinguish it from *Young*. The failure to consider the propriety of declaratory relief requires this Court's attention.

First, enjoining the enforcement of the statutes is exactly what the plaintiffs have requested, in addition to declaratory judgment. Second Amended Complaint; App. at 65a-66a. However, petitioners are not requesting that prosecutors be

ordered to commence more criminal prosecutions, (although that may be the effect), rather, plaintiff's request is that the invalid statute ought not serve as any basis for a prosecutor's inaction. Because the Attorney General has an important leadership role among state prosecutors, a declaration coupled with a mandatory injunction requiring the Attorney General to provide notice to all local prosecutors of the unconstitutionality of the statute, requiring her to change the teaching and investigation policies in the Bureau of Criminal Identification and Investigation and the Peace Officer Training Council, and to require her to advise the Ohio General Assembly of the unconstitutionality of the statute, will undoubtedly ameliorate the pernicious effects of the statute, if not bring about its repeal.

Second, even if an injunction were not what plaintiffs were requesting, or deemed inappropriate, that does not preclude the district court from awarding declaratory relief. Declaratory relief may be based upon "different considerations" than injunctive relief. *Steffel*, 415 U.S. at 469. The district court has the duty to consider the appropriateness, of declaratory relief "irrespective of its conclusion as to the propriety of the issuance of the injunction." *Zwickler v. Koota*, 389 U.S. 241, 254 (1967); *Accord, Steffel*, at 468 (citing *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), and *Dombrowski v. Pfister*, 380 U.S. 479 (1965)).

The importance of declaratory relief may lie in the effect it may have beyond what an injunction may mean to an individual defendant:

> "[T]he declaration may still be able to cut down the deterrent effect of an unconstitutional state statute. The persuasive force of the Court's opinion may lead state prosecutors, courts, and legislatures to reconsider their respective responsibilities toward the statute.

> Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew."

Id., at 470.

The Sixth Circuit's refusal to address the issue of the 11th Amendment's bar of declaratory relief claims requires this Court's supervisory correction in order to enforce the long-established rule that where any legal basis exists to affirm the district court, the appellate court should affirm. *See e.g. Jaffke v. Dunham*, 352 U.S. 280, 281 (1957). This Court may alternatively, in the exercise of supervisory powers, remand the case to the court of appeals to deal with the controlling question. *Dandridge v. Williams*, 397 U.S. 471, 475 (1970); *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 468 (1947).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: December 19, 1996.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0253P (6th Cir.)
File Name: 96a0253p.06

No. 95-3850

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC.; STEVEN BROWN; EVE BROWN; and HILLARY BROWN; and on behalf of a class of children in the state of Ohio similarly situated,
Plaintiffs-Appellees,

v.

JOSEPH T. DETERS, Hamilton County, Ohio, Prosecutor; FAY DUPUIS, Cincinnati, Ohio, City Solicitor, et al.,
Defendants,

BETTY MONTGOMERY, Attorney General of Ohio,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed August 5, 1996

Before: MARTIN and BATCHELDER, Circuit Judges; WISEMAN, District Judge.*

BATCHELDER, J., delivered the opinion of the court in Part I, in which MARTIN, J., and WISEMAN, D. J., joined, and also delivered a separate opinion in Parts II and III (pp. 14-28).

ALICE M. BATCHELDER, Circuit Judge. The plaintiffs filed this action under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Ohio against several defendants. The district court, *inter alia*, rejected the contention of Ohio Attorney General Betty Montgomery, one of the defendants, that the plaintiffs lacked standing to bring this action, and held that the Eleventh Amendment to the United States Constitution does not bar the action against General Montgomery. *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 894 F.Supp. 1129, 1130-34 (S.D. Ohio 1995). General Montgomery appeals.[1]

The plaintiffs in this prospective class action are Children's Healthcare is a Legal Duty, Inc., an organization which says it fights "child abuse and neglect associated with religious practices," and Steven Brown and his minor children, Eve and Hillary. Brown's ex-wife and the children's mother, now known as Kim Strubbe, is a Christian Scientist. She believes in spiritual treatment of children's illnesses through prayer alone and does not allow the medical treatment Brown believes the children need. One of the daughters, Eve, has congenital kidney disease.

The plaintiffs allege that certain provisions of OHIO REV. CODE §§ 2919.22(A)[2] and 2151.03(B)[3] violate the First, Fifth,

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* The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

[1] The plaintiffs do not cross appeal.

[2] OHIO REV. CODE § 2919.22(A) (1993 & Supp. 1995) provides:

and Fourteenth Amendments to the United States Constitution. Plaintiffs specifically object to the second sentence of § 2919.22(A) and the first sentence of § 2151.03(B), which establish exemptions from the duty to provide adequate care for children and from prosecution for failure to provide such care, for persons who treat, by spiritual means, physical or mental illness or defect in children under their care. Plaintiffs contend that these provisions violate the Establishment Clause of the First Amendment,[4] which the Supreme Court since *Everson v. Board of Educ.*, 330 U.S. 1, 8-16, 67 S.Ct. 504, 508-12 (1947), has said applies to the states through the Fourteenth Amendment. The plaintiffs further assert that the exemptions in the Ohio statutes deny equal protection and due process to the class of children in the charge of the exempted persons, as well as to parents and guardians who are not exempted

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> No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

[3] OHIO REV. CODE § 2151.03(B) (1994) provides:

> Nothing in this chapter shall be construed as subjecting a parent, guardian, or custodian of a child to criminal liability when, solely in the practice of his religious beliefs, he fails to provide adequate medical or surgical care or treatment for the child. ...

[4] The merits of the claims are not before us.

I. THE ELEVENTH AMENDMENT

The district court held that the Attorney General would represent the state's interest in this action. 894 F.Supp. at 1131. *Ex parte Young*, 209 U.S. 123, 155-58, 28 S.Ct. 441, 452-53 (1908), carves out an exception to Eleventh Amendment immunity. *Eg., Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102, 104 S.Ct. 900, 909 (1984) (citing *Young*).[5] The district court found that the exception applied and denied General Montgomery's motion to dismiss. *See* 894 F.Supp. at 1134.[6] We conclude, however, that this

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[5] Just this year, the Supreme Court recalled it had "held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." *Seminole Tribe v. Florida*, __U. S.__, __, 116 S.Ct. 1114, 1125 (1996) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, 96 S. Ct. 2666 (1976)). "*Fitzpatrick* was based upon a rationale . . . that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." *Id.* at __, 116 S.Ct. at 1128 (citing *Fitzpatrick*, 427 U.S. at 454, 96 S.Ct. at 2670). Later, in discussing *Young*, the Court held that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Id.* at __, 116 S.Ct. at 1132. *Seminole Tribe* does not change the result of our analysis.

[6] The district court relied on *Young*, 209 U.S. at 159-60, 28 S.Ct. at 454; *Thiokol Corp. v. Department of Treasury*, 987 F.2d 376, 381 (6th Cir. 1993) (the Eleventh Amendment "does not preclude actions against state officials sued in their official capacity for prospective injunctive or declaratory relief"); *Doe v. Wiggington*, 21 F.3d 733, 737 n.3 (6th Cir. 1994) (holding that "claims for prospective relief still may be brought against state officers in their official, as opposed to personal, capacity" (citing *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 105 S.Ct. 3099,

action against the Attorney General of Ohio is barred by the Eleventh Amendment.

A

Under *Young*,

> individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

209 U.S. at 155-56, 28 S.Ct. at 452; *see also Western Union Tel. Co. v. Andrews*, 216 U.S. 165, 166, 30 S.Ct. 286, 287 (1910) (holding that *Young* applies precisely when a statute charges prosecutors with enforcement and they threaten and are about to commence proceedings to enforce the statute); *Dombrowski v. Pfister*, 380 U.S. 479, 483, 85 S.Ct. 1116, 1119 (1965) (calling *Young* "the fountainhead of federal injunctions against state prosecutions" and noting that federal judicial power is properly exercised when state officers "threaten and are about to commence proceedings" (quoting *Young*)); *Terrace v. Thompson*, 263 U.S. 197, 214, 44 S.Ct. 15, 17 (1923) (citations omitted); *Cavanaugh v. Looney*, 248 U.S. 453, 456, 39 S.Ct. 142, 143 (1919) (citations omitted); *Greene v. Louisville & I. R. Co.*, 244 U.S. 499, 506, 37 S.Ct. 673, 677 (1917) (quoting *Young*); *Allinder v. Ohio*, 808 F.2d 1180, 1184 (6th Cir.) (Eleventh Amendment immunity does

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3106 n.14 (1985))); and *Graham*, 473 U.S. at 169 n.18, 105 S.Ct. at 3107 n.18 ("In an injunctive or declaratory action grounded on federal law, the State's immunity can be overcome by naming state officials as defendants." (citations omitted)).

not "shield a state official attempting to enforce an unconstitutional act." (citing *Young*)), *appeal dismissed*, 481 U.S. 1065, 107 S.Ct. 2455 (1987); *but see Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 665-66 n.9 (6th Cir. 1982) (disregarding *Young* in action against a governor, because "substantial public interest in enforcing trade practices legislation" significantly obliged him to enforce state laws using his general authority (citations omitted)).

Courts have not read *Young* expansively. *Eg., Pennhurst*, 465 U.S. at 102, 104 S.Ct. at 909 (citing *Edelman v. Jordan*, 415 U.S. 651, 666-67, 94 S.Ct. 1347, 1357-58 (1974)). *Young* does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute. *1st Westco Corp. v. School Dist. of Philadelphia*, 6 F.3d 108, 113 (3d Cir. 1993) (citing *Rode v. Dellarciprete*, 845 F.2d 1195, 1209 n.9 (3d Cir. 1988)); *see Long v. van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (requiring "a connection between the official sued and enforcement of the allegedly unconstitutional statute [and also] a threat of enforcement" (citing *Young*)); *Kelley v. Metropolitan County Bd. of Educ.*, 836 F.2d 986, 990-91 (6th Cir. 1987) (declining to apply *Young* when defendants were not threatening to enforce any unconstitutional act), *cert. denied*, 487 U.S. 1206, 108 S.Ct. 2848 (1988); *Sperry-Hutchinson Co. v. Kuhn*, 212 F. 555, 556 (E.D. Mich. 1912) (declining to apply *Young* when an attorney general was not charged with enforcing a statute and had not threatened to enforce it (citing *Young; Fitts v. McGhee*, 172 U.S. 516, 19 S.Ct. 269 (1899))).

Young abrogates a state official's Eleventh Amendment immunity when a suit challenges the constitutionality of a state official's *action*. *Pennhurst*, 465 U.S. at 102, 104 S.Ct. at 909; *Banas v. Dempsey*, 742 F.2d 277, 287 (6th Cir. 1984) (*Young* applies only when it is alleged state officials are acting contrary to federal law), *aff'd on other grounds*, 474 U.S. 64,

106 S.Ct. 423 (1986); *Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449, 459 n.9 (6th Cir. 1982) (recognizing that "an action against a state official must be 'based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional' in order to avoid the bar of the Eleventh Amendment" (quoting *Florida Dep't of State v. Treasure Salvors, Inc.*, __U.S.__, __, 102 S.Ct. 3304, 3317 (1982))). *Young* "was based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity... ." *Papasan v. Allain*, 478 U.S. 265, 276, 106 S.Ct. 2932, 2939 (1986).[7] The reason for this "action" requirement is plain: In *Young*, the state officers held no

> special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to

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[7] Our opinions in *Doe* and *Thiokol*, on which the district court relied, 894 F. Supp. at 1134, are not to the contrary.

In *Doe*, a prisoner alleged, *inter alia*, that the defendant prison officials violated his rights by implementing and enforcing a prison policy, by subjecting him to a screening process, and by perusing his medical records. 21 F.3d at 736. We held that the Eleventh Amendment did not bar official-capacity claims for injunctive and declaratory relief which sought to prevent alleged future constitutional violations. *Id.* at 737.

The defendants in *Thiokol* included a state treasurer and a state revenue commissioner whom the plaintiff sued in their official capacities. 987 F.2d at 377. The plaintiff prayed that the court, *inter alia*, enjoin the state's collection of a particular state tax and prohibit the state from refusing to give a refund. *Id.* at 378. We noted that the Eleventh Amendment does not preclude official-capacity actions against state officials for prospective injunctive or declaratory relief, *id.* at 381 (citing *Young*), and allowed the action to proceed against the two officials. *See id.* at 383.

> see to its enforcement. If, because they were law officers of the state, a case could be made for ... testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general ... . That would be a very convenient way for obtaining a speedy judicial determination of ... constitutional law ..., but it is a mode which cannot be applied to the states ... consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. ...
>
> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, ... such officer must have some connection with the enforcement of the act, or else it is merely making ... the state a party. ...
>
> The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact ... .

Young, 209 U.S. at 157, 28 S.Ct. at 452-53.

Consistent with the *Young* requirement of action on the part of the state official, we note that the phrase "some connection with the enforcement of the act" does not diminish the requirement that the official threaten and be about to commence proceedings. *See, e.g., id.* at 155-56, 28 S.Ct. at 452. "General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." *1st Westco*, 6 F.3d at 113 (citing *Rode*, 845 F.2d at 1208); *see also Aerated Prods. Co. v. Department of Health*, 59 F.Supp. 652, 655 (D. N.J. 1945)

(citing *Young; Greene*), *aff'd*, 159 F.2d 851 (3d Cir. 1947). Holding that a state official's obligation to execute the laws is a sufficient connection to the enforcement of a challenged statute would extend *Young* beyond what the Supreme Court has intended and held. *See Weinstein v. Edgar*, 826 F.Supp. 1165, 1167 (N.D. Ill. 1993); *Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir. 1976) (an attorney general's duty to support the constitutionality of challenged state statutes and his duty to defend actions in which the state is interested do not constitute enforcement of the statute in question); *see also Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute." (citing *Gras v. Stevens*, 415 F.Supp. 1148, 1152 (S.D. N.Y. 1976))).

B

The plaintiffs before us are not complaining of any action by General Montgomery. What we have here is not action, but inaction, and *Young* does not apply. The Attorney General did not threaten to commence and was not about to commence proceedings[8] against the plaintiffs,[9] much less proceedings to enforce an allegedly unconstitutional act.[10]

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[8] In that sense, we have the opposite of what the Supreme Court faced in *Morales v. Trans World Airlines, Inc.*, where attorneys general "had made it clear that they would seek to enforce" what was at issue, __U.S.__, __, 112 S.Ct. 2031, 2035 (1992), and suit was imminent. *See id.* at __, 112 S.Ct. at 2036.

[9] That the Attorney General also did not threaten to commence and was not about to commence proceedings against Strubbe is immaterial to this appeal, although it is consistent with the challenged statutes and may provide comfort to Strubbe.

[10] On this basis, we distinguish *Zielasko v. Ohio*, 873 F.2d 957 (6th Cir. 1989), in which the plaintiffs sought to have the federal courts enjoin

This action also does not fall within the *Young* exception, because the plaintiffs do not seek to *enjoin* the enforcement of an allegedly unconstitutional statute. *See Young*, *209* U.S. at 155-57, 28 S.Ct. at 452-53. Instead, the plaintiffs in effect pray that the federal courts *permit* a broader enforcement of certain statutes by striking down those provisions of the statutes which prevent their enforcement with respect to persons against whom the plaintiffs believe enforcement is proper. This would turn *Young* inside out.

Moreover, Ohio law delegates the enforcement of the challenged statutes to local prosecutors, not the Attorney General. *See generally* OHIO REV. CODE §§ 109.02 (Supp. 1995), 109.14(A) (1994), 309.08(A) (Supp. 1995), 1901.34(A)-(D) (Supp. 1995). General Montgomery has no connection to the enforcement of the statutes. *Cf. Akron Ctr. for Reproductive Health v. Rosen*, 633 F. Supp. 1123, 1130 (N.D. Ohio 1986) (dismissing the Ohio Governor and Attorney General under the Eleventh Amendment, because they had no connection to enforcement of a statute, while noting that enforcement was clearly delegated to the state's prosecuting attorneys), *aff'd on other grounds*, 854 F.2d 852 (6th Cir. 1988), *rev'd on other grounds*, 497 U.S. 502, 110

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future enforcement of a state constitutional provision they asserted violated the federal Constitution. We allowed the action to proceed under *Young*. *Id.* at 959. The provision prohibited one of the plaintiffs from running for a judgeship, because he was over 70. *Id.* at 958. In order to run, he had to fill out a declaration of candidacy which certified that he was qualified to seek office, which he was not, given the provision he wanted declared unconstitutional. We found that such a declaration of candidacy "is made under the *threat* of criminal penalty for 'election falsification.'" *Id.* at 959 (emphasis added). We also noted that the district court properly found that by signing the declaration, the judge would subject himself to "real and immediate (not merely conjectural or hypothetical) harm of criminal penalty." *Id.*

We cannot say anything analogous about the plaintiffs before us.

S.Ct. 2972 (1990);[11] *Long*, 961 F.2d at 152 (instructing the district court to dismiss an attorney general on Eleventh Amendment grounds, after finding no "real likelihood" that he would employ his supervisory powers against the plaintiffs' interest); *1st Westco*, 6 F.3d at 114 (recalling a previous holding that the joining of a party based solely on his general obligation to uphold the law is appropriate only when there is a real likelihood or realistic potential that the connection will be used against the plaintiff's interest (quoting *Rode*, 845 F.2d at 1208)).

This action is akin to one in the Seventh Circuit in which the plaintiffs' action challenging the constitutionality of a state statute named as the defendant the state's Attorney General, who had never threatened to prosecute them and had no authority under the statute to do so. The Seventh Circuit's observation is equally appropriate here: "Plaintiffs apparently named the office of the Attorney General in an effort to obtain a judgment binding the State ... as an entity, a step that Congress did not authorize when enacting 42 U.S.C. § 1983 and that the [E]leventh [A]mendment does not permit in the absence of such authorization." *Sherman v. Community Consol. School Dist. 21*, 980 F.2d 437, 441 (7th Cir. 1992) (citing *Fitzpatrick*), *cert. denied*, 508 U.S. 950, 113 S.Ct. 2439 (1993), *see also Los Angeles Branch, NAACP v. Los Angeles Unified School Dist.*, 714 F. 2d 946, 953 (9th Cir. 1983) (finding that the plaintiffs sued a governor as a surrogate for the state to evade Eleventh Amendment immunity (citing *Young*)), *cert. denied*, 467 U.S. 1209, 104 S.Ct. 2398 (1984).[12]

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[11] In *Akron Center*, the Northern District of Ohio distinguished our anomalous holding in *Allied Artists*. *See* 633 F.Supp. at 1129-30 (quoting *Allied Artists*, 679 F.2d at 666 n.5).

[12] We need not speculate about why the plaintiffs below, including Children's Healthcare is a Legal Duty, Inc., would have sought a judgment binding the state

C

In support of their view that the Eleventh Amendment does not bar this action against the Attorney General, the plaintiffs call our attention to the language in *Papasan* which states that "*Young's* applicability has been tailored to conform as precisely as possible to those specific situations in which it is 'necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States."'" 478 U.S. at 277, 106 S.Ct. at 2940 (quoting *Pennhurst*, 465 U.S. at 105, 104 S.Ct. at 910). Placing this quotation in context, we note that it is part of a general discussion of the overall scope of the *Young* exception to Eleventh Amendment immunity, which acknowledges that *Young* "does not insulate from Eleventh Amendment challenge every suit in which a state official is the named defendant. ... *Young* applies only where the underlying authorization upon which the named official *acts* is asserted to be illegal." *Id.* (emphasis added) (citing *Cory v. White*, 457 U.S. 85, 102 S.Ct. 2325 (1982)). When read with the sentences which precede and follow it, the language the plaintiffs cite does not support their position:

> We have also described certain types of cases that formally meet the *Young* requirements of a state official acting inconsistently with federal law but that stretch that case too far and would upset the balance of federal and state interests that it embodies. *Young's* applicability has been tailored to conform as precisely as possible to those specific situations in which it is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" Consequently, *Young* has been focused on cases in which a violation of

> federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation.

Id. at 277-78, 106 S.Ct. at 2940 (emphasis added) (internal citation omitted).

D

The district court erred in holding that General Montgomery has no Eleventh Amendment immunity in this action. The *Young* exception does not apply. We REVERSE the district court's holding that the Attorney General has no Eleventh Amendment immunity. Accordingly, we REMAND this action to the district court with instructions to DISMISS this action in its entirety.

ALICE M. BATCHELDER, Circuit Judge.

II. THE *COHEN* DOCTRINE

Part I is the court's opinion. I write separately, in Parts II and III, to explain why the plaintiffs lack standing, and why I believe the court should address that issue, even though none of the parties raised it before us.

In her appellate brief, the Attorney General contested only the district court's ruling on the Eleventh Amendment. Asked at oral argument why she had not appealed the ruling on standing, she explained that the *Cohen* doctrine forecloses this option. *See generally Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46, 69 S.Ct. 1221, 1225-26 (1949).

In *Cohen*, the Supreme Court addressed the appealability of a district-court order. Title 28 U.S.C. § 1291 (1993) grants courts of appeal "jurisdiction of appeals from all final decisions of the district courts ... except where direct review may be had in the Supreme Court." *Cohen* provided for exceptions to this norm for a small class of "collateral" orders. *See, e.g., Purnell v. City of Akron*, 925 F.2d 941, 945 n.3 (6th Cir. 1991) (citations omitted). "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order [from which a party appeals] must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458 (1978) (citing *Abney v. United States*, 431 U.S. 651, 658, 97 S.Ct. 2034, 2039 (19__); *United States v. MacDonald*, 435 U.S. 850, 855, 98 S.Ct. 1547, 1549 (19__)), *quoted in Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, __U.S.__, __, 113 S. Ct. 684, 688 (1993).

Although the *Cohen* doctrine permits us to hear the Attorney General's appeal regarding Eleventh Amendment

immunity, *see Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 5 F.3d 147, 149-50 (6th Cir. 1993) (orders denying sovereign immunity are effectively unreviewable as part of a final decision (quoting *Puerto Rico Aqueduct*, __U.S. at __, 113 S.Ct. at 687-89)), some circuits have relied on the *Cohen* doctrine in declining to rule on parties' standing. *See Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 496-97 n.2 (7th Cir. 1993) (citations omitted); *Shanks v. City of Dallas*, 752 F.2d 1092, 1099 n.9 (5th Cir. 1985) (citations omitted); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 474-75 (2d Cir. 1974) (citations omitted).

The court below found that the plaintiffs had standing. 894 F.Supp. at 1132-34. Although this conclusively determined a disputed question and resolved an important issue completely separate from the merits of the action, standing is *not* effectively unreviewable upon appeal from a final judgment. *See Triad*, 10 F.3d at 496 n.2 ("Limitations issues fail the last prong of this test. Similarly, a denial of a motion to dismiss for lack of standing does not qualify as a final judgment and thus is not eligible for review at this time." (citations omitted)).[1]

At first glance, this might suggest that we may not consider the plaintiffs' standing. *See id.* at 496-97 n.2. Indeed, that might have been a holding I would endorse had the appellant raised only the issue of standing. However, when an appellant properly appeals another issue, the issue of standing comes before us as well. Constitutional standing is *always* a threshold inquiry for us to make before asserting jurisdiction over an appeal. *Newsome v. Batavia Local School Dist.*, 842 F.2d 920, 922 (6th Cir. 1988) (quoting *Allstate Ins. Co. v. Wayne County*, 760 F.2d 689, 691 (6th Cir. 1985)); *United*

[1] Holding that standing *is* effectively unreviewable might allow an immediate appeal whenever a district court finds plaintiffs have standing. I would decline to interfere with the district courts' dockets in this manner and thereby open the floodgates to our own docket.

States v. Van, 931 F.2d 384, 387 (6th Cir. 1991) ("Standing is a threshold inquiry that a court must consider prior to addressing the merits of an appeal." (citing *T.H.E. Ins. Co. v. Naghtin*, 916 F.2d 1082, 1085 (6th Cir. 1990); *Jaimes v. Toledo Metro. Housing Auth.*, 758 F.2d 1086, 1092 (6th Cir. 1985))); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 555 n.22 (5th Cir. 1996) (Standing "is a jurisdictional requirement, and may always be addressed for the first time on appeal." (citing *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 521 (5th Cir. 1995))), *petition for cert. filed*, 64 U.S.L.W. 3780 (U.S. May 10, 1996) (No. 95-1831); *see Mount Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1581 (9th Cir. 1993) (noting that court of appeals is always mindful of its obligation to raise standing *sua sponte* (citing *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir. 1980))).[2] We have an independent obligation to examine our own jurisdiction. Standing is perhaps the most important jurisdictional doctrine. *United States v. Hays*, __U.S.__, __, 115 S.Ct. 2431, 2435 (1995) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31, 110 S.Ct. 596, 607-08 (1990)). Even when the parties concede jurisdiction, we must satisfy ourselves of our own jurisdiction and that of the lower court. *FW/PBS*, 493 U.S. at 231, 110 S.Ct. at 607 (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165 (1934)); *cf. Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.) (considering standing and justiciability despite the plaintiffs' contention that justiciability was not before the court of appeals (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89

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[2] We also have held that federal courts, being courts of limited jurisdiction, must examine their subject-matter jurisdiction "throughout the pendency of *every* matter before them." *In re Wolverine Radio Co.*, 930 F.2d. 1132, 1137 (6th Cir. 1991) (emphasis added), *cert. dismissed*, 503 U.S. 978, 112 S.Ct. 1605 (1992). We adhered to this principle in *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320,1325 (6th Cir. 1993).

S.Ct. 1843, 1848 (1969); *City of South Lake Tahoe*, 625 F.2d at 233)), *cert. denied*, 454 U.S. 1031, 102 S.Ct. 567 (1981).

Standing is a qualifying hurdle which plaintiffs must clear when we raise the issue *sua sponte*, regardless of whether the plaintiffs have prevailed on the issue in the district court and the defendants have not raised it on appeal, *see Community First Bank v. National Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994); *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1161 n.5 (6th Cir. 1988) (citing *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868 (1976)); *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 628 F.2d 1289, 1301 (10th Cir. 1980) (court of appeals was obliged to consider appellees' standing to seek injunctive relief in the district court, even though neither party raised the issue on appeal (quoting *Juidice v. Vail*, 430 U.S. 327, 331, 97 S.Ct. 1211, 1215 (1977))), *cert. denied*, 452 U.S. 963, 101 S.Ct. 3114 (1981), or whether no one has raised the issue at all before the action reaches us. *See Director, Office of Workers' Compensation v. Newport News Shipbuilding & Dry Dock Co.*, __U.S.__, __, __, 115 S.Ct. 1278, 1282, 1288 (1995) (affirming a *sua sponte* finding by a court of appeals that the petitioner lacked standing); *Bzdzuich v. United States Drug Enforcement Admin.*, 76 F.3d 738, 742 (6th Cir. 1996) (citing *American Fed'n of State, County & Mun. Employees Local 506 v. Private Indus. Council*, 942 F.2d 376, 378 (6th Cir. 1991)), *Newsome*, 842 F.2d at 922 (quoting *Allstate*, 760 F.2d at 691).

I would therefore proceed to consider the plaintiffs' standing.

III. STANDING

The district court held that to demonstrate standing, a party must "show [1] that he personally has suffered some actual *or threatened* injury as a result of the putative illegal conduct of

the defendant, and [2] that the injury '*fairly can be traced* to the challenged action' and [3] is likely to be redressed by a favorable decision ... ." 894 F.Supp. at 1132 (emphasis added) (ellipsis omitted) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758 (1982)). The Supreme Court has tightened up the rules on standing, particularly with respect to the phrases emphasized above. Most recently, the Court has said:

> It is by now well settled that "the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Hays, __U.S. at __, 115 S.Ct. at 2435 (ellipsis omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1992)).

A. INJURY IN FACT

1

The injury-in-fact requirement "mandates that the party allege such a personal stake in the outcome of the controversy as to warrant his invocation of federal jurisdiction." *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 691 (6th Cir. 1994) (internal quotation marks omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975)).

The district court held that the plaintiffs must present the court with a threatened injury but that they need not "await consummation of the threatened injury to seek relief," 894 F.Supp. at 1133 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1000, 102 S.Ct. 2777, 2784 (1982)), and that the "question becomes whether any perceived threat to [Plaintiffs] is sufficiently real and immediate to show an existing controversy ... ." *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496, 94 S.Ct. 669, 676 (1974)). Because several Ohio children have died after their parents' religious beliefs led to a denial of adequate medical care, and the district court found the threatened injury in this action was real, *id.* (citing *State v. Miskimens*, 22 Ohio Misc.2d 43, 49, 22 O.B.R. 393, 400, 490 N.E.2d 931, 938 (Coshocton County, Ohio, Common Pleas Ct. 1984)), the district court concluded the plaintiffs had alleged adequate injury in fact. *Id.*

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Trying to ascertain the plaintiffs' injury is like trying to catch a ghost in a gunnysack: Each time it appears within the grasp, it slips away.

In the second amended complaint, Brown and members of Children's Healthcare is a Legal Duty, Inc., state they do not believe it is effective to treat children's illnesses spiritually, through prayer alone. Brown believes Strubbe will continue to provide such spiritual treatment to the exclusion of medicine.

After the Browns were divorced in New Hampshire in 1987, the former Mrs. Brown and the children moved to Hamilton County, Ohio. Upon Brown's motion, New Hampshire courts amended the Browns' divorce decree to require that the children see a physician for periodic medical checkups and that Strubbe report to the physician any illnesses

of the children. Brown obtained additional safeguards in Ohio courts. Now he alleges that

> [t]he lives and good health of [his] minor children are threatened by the preference given by the State of Ohio in O.R.C. §§ 2919.22(A) and 2151.03(B) to spiritual treatment of children through prayer alone and the exemption from criminal liability provided to those who practice it on [his] minor children.

He further alleges that Strubbe has knowingly failed to provide periodic medical checkups and observation, and neglected to immunize both children against common childhood diseases.

Finally, the complaint avers that even though two Ohio Courts of Common Pleas have held OHIO REV. CODE § 2919.22(A) unconstitutional, both dismissed prosecutions of defendants who denied medical care to minors for religious reasons and were charged under the statute, because they did not have fair notice of the unconstitutionality of the exemption. This, the plaintiffs claim, deters--even prevents--criminal prosecutions of a parent, guardian, or custodian who "neglects or endangers the health of a child because of a religious belief." The plaintiffs assert that the exemptions in the Ohio statutes deny equal protection and due process to the class of children who are in the charge of the exempted persons, as well as to parents and guardians who are not exempted, and that the exemptions stigmatize the plaintiffs, as non-believers, and violate the Establishment Clause of the First Amendment.

3

Neither *Blum* nor *O'Shea*, on which the district court relied, supports the district court's conclusion that the plaintiffs here have alleged an injury in fact. In *Blum*, a class of

Medicaid patients challenged decisions of nursing homes where they lived to discharge or transfer them without notice or opportunity for a hearing. The issue was whether the state of New York, which provided Medicaid assistance to eligible patients in these nursing homes, was subject to procedural strictures of the Fourteenth Amendment. *See* 457 U.S. at 993, 102 S.Ct. at 2780. Physicians chosen by the nursing homes pursuant to Medicaid regulations decided the patients' continued stay in the nursing homes was not medically necessary. The patients claimed there was a serious threat the nursing homes themselves would reach similar conclusions and discharge or transfer patients without adequate notice or hearings. *Id.* at 999-1000, 102 S.Ct. at 2783. The Court noted that there was no legal impediment to the nursing homes' independently determining that their patients' continued stay was no longer medically necessary, and held that "the threat of facility-initiated discharges or transfers to lower levels of care is sufficiently substantial that [the patients] have standing to challenge their procedural adequacy." *Id.* at 1000, 102 S.Ct. at 2784. The Court then stated that one "does not have to await the consummation of threatened injury to obtain preventive relief" (the language on which the district court here relied), *id.* (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S.Ct. 658, 664 (1923)), adding that the possibility that nursing homes would decide patients' continued stay is not medically necessary was not a possibility which was imaginary or speculative. *Id.* (quoting *Younger v. Harris*, 401 U.S. 37, 42, 91 S.Ct. 746, 749 (1971) (holding that those having imaginary or speculative fears of state prosecution may not be plaintiffs in federal actions to stop a prosecution)).

However, a plaintiff does not have--and *Blum* did not hold that he has--an injury in fact merely because his alleged injury rises above the imaginary or speculative. *See id.* Plaintiffs must allege "an invasion of a legally protected interest which is

(a) concrete and particularized, and (b) actual or imminent, not, conjectural or hypothetical." Hays, __U.S. at __, 115 S. Ct. at 2435 (quoting *Lujan*, 504 U.S. at 560-61, 112 S.Ct. at 2136). *Blum* was decided before *Lujan* and addressed only the requirement that, to have standing to bring an action, plaintiffs allege a threat of injury that is more than merely speculative. To the extent that *Blum* remains useful in the standing analysis, it is because its standard for the necessary injury meets the *Lujan* requirements. Clearly *Blum* required that plaintiffs allege an imminent invasion of their legally protected interest in adequate discharge and transfer procedures. But *Blum* is of no help to these plaintiffs, who allege no comparable invasion of a legally protected interest.

In *O'Shea*, 19 respondents alleged that the petitioner judges violated respondents' constitutional rights by illegal bond-setting, sentencing, and jury-fee practices, but none of the 19 alleged that he had suffered any such injury. 414 U.S. at 495, 94 S.Ct. at 676. The Court surmised,

> If the statutes that might possibly be enforced against respondents are valid laws, and if charges under these statutes are not improvidently made or pressed, *the question becomes whether any perceived threat to respondents is sufficiently real and immediate to show an existing controversy* simply because they anticipate violating lawful criminal statutes and being tried for their offenses, in which event they may appear before petitioners and, if they do, they will be affected by the allegedly illegal conduct charged.

Id. at 496-97, 94 S. Ct. at 676 (emphasis added to show the language quoted by the district court in the action before us). This, the Court concluded, was speculation and conjecture, *id.* at 497, 94 S.Ct. at 676 (citing *Younger*, 401 U.S. at 41-42, 91

S.Ct. at 749), and did not amount to a case or controversy. *Id.* at 497, 94 S.Ct. at 677.

4

Most, if not all, of what the plaintiffs allege fails to state an injury in fact under *Lujan*. The plaintiffs do not assert, for example, that because they do not come within the exemptions, General Montgomery has prosecuted or threatens to prosecute *them* under the statutes in question. Clearly, when viewed in context, the language the district court took from *O'Shea*[3] does not support the court's conclusion. The chance that the Attorney General[4] will providently enforce OHIO REV. CODE §§ 2919.22(A) and 2151.03(B) against the *plaintiffs* in this action does not even rise to the level of speculation and conjecture.

Neither do the plaintiffs' beliefs about (1) the effectiveness of treating illnesses through prayer, (2) the likelihood that Strubbe will continue to provide spiritual treatment to the children, (3) any preference which the statutes may or may not give to spiritual treatment of children, (4) any exemption of criminal liability for those who give such treatment, or (5) any deterrence or prevention of the prosecution of someone else who "neglects or endangers the health of a child because of a religious belief," assert an invasion of a legally protected interest of any of the plaintiffs which is concrete, particularized, and either actual or imminent.[5] Nor does what

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[3] I recognize that *Blum* also quoted *O'Shea*, *see* 457 U.S. at 1000, 102 S.Ct. at 2784, and that both quoted *Younger*.

[4] Or, for that matter, anyone else in Ohio.

[5] What is clear from the complaint is that the plaintiffs want Strubbe prosecuted, or they want the sword of prosecution hanging over her. Because the exemptions in these statutes are roadblocks to this, the plaintiffs want the federal courts to remove them. However, plaintiffs may not claim any injury in fact in this regard. A "private citizen lacks a

happened to other children, however tragic that may have been.

This leaves Brown's allegation that Strubbe has knowingly failed to provide the children periodic checkups/observations and immunize them against childhood diseases. I will assume, *arguendo*, that this states an injury in fact under *Lujan* for Brown and his children.

B. Causal Connection

The second part of the standing inquiry requires "a causal connection between the injury and and the conduct complained of." *Hays*, __U.S. at __, 115 S. Ct. at 2435 (quoting *Lujan*, 504 U.S. at 560-61, 112 S. Ct. at 2136). In this action, the inquiry is whether there is a causal connection between the conduct the plaintiffs complain of and what I will assume, *arguendo*, is an injury in fact to Brown and the children.

The district court found that the "statute itself causes the immediate *threat of* injury. Therefore, the Plaintiffs' *cause of* injury *correlates directly* with the statute, and a sufficient nexus exists for the Plaintiffs to bring this claim." 894 F.Supp at 1133 (emphasis added). I cannot agree.

The second element of the standing inquiry requires that there be actual causation between the challenged conduct and the claimed injury. The *Hays* Court cited *Lujan* for that proposition, and the *Lujan* Court cited *Simon v. Eastern Ky. Welfare Rights Org.*, 429 U.S. 26, 41-42, 96 S.Ct. 1917, 1926 (1976). *Eastern Kentucky Welfare Rights* was an action in which plaintiffs challenged a revenue ruling, claiming that by adopting the ruling, the Internal Revenue Service

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judicially cognizable interest in the prosecution or nonprosecution of another." *Diamond v. Charles*, 476 U.S. 54, 64, 106 S.Ct 1697, 1704 (1986) (citations omitted).

"encouraged" hospitals to deny services to indigents. The Court reiterated the causation requirements for standing, and specifically noted that "the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id.* The Court went on to point out that it was purely speculative whether the denials of service to indigents, were fairly traceable to the claimed "encouragement" from the revenue ruling, or instead were the result of decisions the hospitals made without regard to the tax implications. *Id.* at 42-43, 96 S.Ct. at 1926.

The plaintiffs here simply cannot meet the causation requirement of the standing inquiry. They challenge no action of the defendants at all. At best, the challenge could be to these defendants' failure to prosecute individuals whom the statute expressly exempts from prosecution. Even if the fact is overlooked that no conduct of the defendants is the cause of the plaintiffs' claimed injury, the plaintiffs still fall short. Their claims here are analogous to the claims in *Eastern Kentucky Welfare Rights*.[6] The plaintiffs complain that because the challenged provisions in Ohio's statutes create a religion-based class of parents or guardians and exempt them from criminal prosecution for denying, on religious grounds, medical attention to children in their charge, the minor plaintiffs have been or will be denied adequate medical care, and non-exempt parents and guardians have been or will be denied the equal protection of the laws. But it is purely speculative whether denials of medical attention by members of the exempted class are fairly traceable to the exemptions in the statutes, much less

[6] *Eastern Kentucky Welfare Rights* named as defendants the Secretary of the Treasury and the Commissioner of Internal Revenue, who issued the challenged revenue ruling. 429 U.S. at 28, 96 S.Ct. at 1919-20.

that any denial of equal protection to these plaintiffs can be traced to those exemptions. To find the required causal connection between the exemptions and the denial of medical care, one would have to assume that if the parents and guardians in the religion-based class were not exempt from prosecution, they would no longer deny medical treatment on religious grounds to children in their charge. And for the statutes' exemption of certain parents and guardians from the threat of prosecution to work a denial of equal protection to non-exempt parents and guardians, one would have to assume that such parents an guardians provide medical care to children in their charge only because of the threat of prosecution for failure to provide such care. This, in the words of Justice Scalia, "is beyond all reason." *Lujan*, 504 U.S. at 566, 112 S.Ct. at 2139. It is not the exemptions in the Ohio statutes that deny some children, including these minor plaintiffs, periodic medical checkups/observations or immunizations. It is the independent actions of their parents or guardians, third parties who are not before the court. And if some parents and guardians provide medical care to their children for reasons other than the threat of prosecution, then the exemption does not deny those parents and guardians equal protection; it simply does not affect them at all.

C. Likely Redress

The district court concluded that if it found the exemption provisions in the statutes unconstitutional, the plaintiffs' "*threatened* injury would *subside*. ... Therefore, relief from injury will likely follow from this court issuing a favorable decision ... ." 894 F.Supp. at 1134 (emphasis added).

An inquiry such as this must address injuries in fact which are concrete, particularized, and either actual or imminent. And, as the district court recognized, *see id.* at 1133 (citing *Allen v. Wright*, 468 U. S. 737, 751, 104 S. Ct. 3315, 3324

(1984)), the third part of the standing inquiry requires that it "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Hays*, __U.S. at __, 115 S.Ct. at 2435 (quoting *Lujan*, 504 U.S. at 560-61, 112 S.Ct. at 2136).

The plaintiffs have sued General Montgomery, identifying her as Ohio's chief law officer and averring that her duties include appellate prosecution of offenses in conjunction with county prosecuting attorneys; prosecuting "any person indicted for a crime upon the written request of the Governor"; counseling a prosecuting attorney regarding any actual or prospective suit which involves the state; and, at the request of the Governor or the General Assembly, appearing before any court or tribunal in cases in which the state is directly interested.

Noting that the plaintiffs had filed this action against the Attorney General and two local prosecutors, the district court dismissed the local prosecutors, because they acted as state officials. 894 F.Supp. at 1131 (citing *Pusey v. City of Youngstown*, 11 F.3d 652, 657-58 (6th Cir. 1993)). However, the district court incorrectly held that the Attorney General would represent the state's interest in this action. *See id.* And by stating, without citation, that the proper defendants in this type of action are the law makers, not the law enforcers, *id.* at 1132, and then refusing to dismiss the Attorney General, the district court incorrectly implied that the Attorney General is a law maker.

Even if the plaintiffs and the district court had accurately characterized the Attorney General's duties, *see generally* OHIO REV. CODE §§ 109.02 (Supp. 1995), 109.14(A) (1994), 309.08(A) (Supp. 1995), 1901.34(A)-(D) (Supp. 1995), the plaintiffs could not meet the redressability requirement. Again, "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Diamond*, 476 U.S. at 64, 106 S.Ct. at 1704 (citations omitted). We

followed this principle in *Associated Builders*, 16 F.3d at 692, and held that the right to have the government follow the law is not by itself sufficient to confer jurisdiction in a federal court. *Id.* (quoting *Allen*, 468 U.S. at 754, 104 S.Ct. at 3326). The plaintiffs have no judicially cognizable interest in having Strubbe prosecuted or in having this sword--the threat of prosecution--hang over her, and in the absence of the challenged exemptions in the statutes, the plaintiffs could not compel the Attorney General to prosecute--or threaten to prosecute--the children's mother.[7]

Therefore, even if this court were to hold that the exemptions in question are unconstitutional, it is not "likely" that such a decision would redress any alleged injury to the plaintiffs. As in *Eastern Kentucky Welfare Rights*, it is purely speculative whether the invalidating of the challenged provisions of the statutes would redress the plaintiffs' claimed injury, i.e., that simply removing the exemptions from the statutes would cure the alleged failure of the children's mother to provide them with periodic medical checkups/observations and have them immunized against childhood diseases.[8]

D

None of the individual plaintiffs having alleged facts demonstrating that he has standing to bring this action, it is clear that Children's Healthcare is a Legal Duty, Inc., whose membership is made up of individuals similarly situated to and having the same concerns as plaintiff Steven Brown, lacks standing as well. *See Hunt v. Washington State Apple*

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[7] They also could not compel anyone else, including the local prosecutors, to prosecute, or threaten to prosecute, the children's mother, but that is not dispositive, because the local prosecutors are not before us.

[8] Although other legal remedies are available to the father to have his children receive what he believes is proper medical care, that is not dispositive in this action.

Advertising Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441 (1977).

E

For the foregoing reasons, I would hold that the plaintiffs lack standing to bring this action.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC., et al.,	:	Case No. C-1-94-556
Plaintiffs,	:	
v.	:	
JOSEPH T. DETERS, et al.,	:	ORDER
Defendants.	:	

This matter is before the Court on Defendants, Hamilton County Prosecutor and Cincinnati City Solicitor's, Motion for Judgment on the Pleadings (doc. 20), the Plaintiffs' Memorandum in Opposition (doc. 30), and the Defendants' Reply (doc. 37). Additionally, the Attorney General of Ohio has filed a Motion to Dismiss (doc. 36), to which the Plaintiff filed a Memorandum in Opposition (doc. 38), to which the Attorney General replied (doc. 39).

BACKGROUND

The Plaintiffs, Children's Healthcare is a Legal Duty (CHILD), Steven Brown and his children, filed this action alleging that Ohio Revised Code § 2919.22(A) and § 2151.03 violate the First, Fifth and Fourteenth Amendments of the United States Constitution. CHILD is a non-profit organization whose purpose is to "fight child abuse and neglect associated with religious practices." Mr. Brown is the parent of two children who reside in Hamilton County, Ohio,

with their mother, who practices a religion commonly known as Christian Science.

The Plaintiffs object to the Ohio law that provides for spiritual exemptions from the child endangerment and juvenile statutes. The Plaintiffs object specifically to the second sentence of section 2919.22, which provides:

> No person, who is the parent, guardian, custodian person having custody or control, or person in loco parentis of a child under eighteen years of age, or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk of health or safety of the child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

Furthermore, the Plaintiffs object to the first sentence of section 2151.03(B), which provides: "[n]othing in this chapter shall be construed as subjecting a parent, guardian, or custodian of a child to criminal liability when, solely in the practice of his religious beliefs, he fails to provide adequate medical or surgical care or treatment for the child." The Plaintiffs allege that these sections violate the First Amendment of the United States Constitution, and in particular the Establishment Clause.

The Plaintiffs filed suit against the Attorney General of Ohio, Hamilton County Judicial Officers, the Justices of the Ohio Supreme Court, the Prosecuting Attorney for Hamilton County, and the City Solicitor for Cincinnati. We dismissed the judicial officers. See document 11. The remaining

Defendants now move to dismiss this action, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 12(c). They claim the Plaintiffs lack standing to bring this action. Additionally, the Prosecutor and City Solicitor argue that they are not sufficient adversaries to be defendants in this action.

Both parties have submitted matters outside of the pleadings. Therefore, the motion is most akin to one for summary judgment, and the Court will consider it as a motion for summary judgment.

STANDARD OF REVIEW

The narrow question that we must decide on a motion for summary judgment is whether there exists a "genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court elaborated upon the appropriate standard in deciding a motion for summary judgment as follows:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case. Id. at 321; Guarino v. Brookfield Township Trustees, 980 F.2d 399, 405 (6th Cir. 1992); Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). If the moving party meets this burden, then the non-moving party "must set forth specific facts showing

there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Guarino, 980 F.2d at 405.

As the Supreme Court stated in Celotex, the non-moving party must "designate" specific facts showing there is a genuine issue for trial. Celotex, 477 U.S. at 324; Guarino, 980 F.2d at 405. Although the burden might not require the non-moving party to "designate" facts by citing page numbers, "'the designated portions must be presented with enough specificity that the district court can readily identify the facts upon which the non-moving party relies.'" Guarino, 980 F.2d at 405 (quoting Inter-Royal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989), cert. denied, 494 U.S. 1091 (1990)).

Summary judgment is not appropriate if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Conclusory allegations, however, are not sufficient to defeat a motion for summary judgment. McDonald v. Union Camp Corp., 898 F.2d 1155, 1162 (6th Cir. 1990).

DISCUSSION

I. Prosecuting Attorneys

The Plaintiffs filed this action against both the Hamilton County Prosecutor and the Cincinnati City Solicitor. Both claim they are not proper parties to this law suit. A city or county official who prosecutes state criminal charges acts as a state official. Pusey v. City of Youngstown, 11 F.3d 652, 657 (6th Cir. 1993). Therefore, the Court must treat a suit against such an official as a suit against the state. Id. at 658. Consequently, the prosecutors are unnecessary parties, because the Attorney General will represent the interests of the state.

Additionally, the Hamilton County Prosecutor and the Cincinnati City Solicitor must follow state law. The Plaintiffs do not allege a city or county policy statement, ordinance, or regulation is unconstitutional. Plaintiffs only claim that the prosecutors have failed to prosecute actions that the state has deemed legal. "It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the 'policy' of enforcing state law." Surplus Store and Exchange, Inc. v. City of Delphi, 928 F.2d 788, 791 (7th Cir. 1991).

Prosecutors can only bring criminal charges for activities the state has deemed criminal. while prosecutors do have considerable discretion under criminal law's boundaries, they cannot travel outside those boundaries and create criminal charges. Allowing such a law suit would open a pandora's box, where any party that regarded a previous legal action as criminal could sue the prosecutor. The law makers not the law enforcers are the proper defendants in this type of suit. Therefore, the Hamilton County Prosecutor and the Cincinnati City Solicitor are not proper defendants. We hereby DISMISS them from this law suit.[1]

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[1] Additionally, the prosecutors are not proper adversaries to be part of this law suit. In prior suits, the prosecutors have also argued that this statute is unconstitutional. See, e.g., State v. Miskimens, 22 Ohio Misc. 2d 43, 490 N.E.2d 931 (1984). In order for us to properly decide an issue, the parties must have adverse legal interests and the dispute must be definite and concrete. Haskell v. Washington Township, 864 F.2d 1266, 1275 (6th Cir. 1988).

II. Ohio Attorney General

A. Standing

The Ohio Attorney General argues that the Plaintiffs do not have standing to bring this action. The requirement of standing "assure[s] the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978). In order to have standing, the party invoking the court's authority must "show [1] that he personally has suffered some actual or threatened injury as a result of the putative illegal conduct of the defendant, . . . and [2] that the injury 'fairly can be traced to the challenged action' and [3] is likely to be redressed by a favorable decision[.]" Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (citations omitted). Additionally, the Plaintiffs must show that they are the "proper proponent of the rights on which the action is based." Haskell v. Washington Township, 864 F.2d 1266, 1275 (6th Cir. 1988).

"It should be emphasized that 'standing in no way depends upon the merits of the plaintiff's contention that the particular conduct is illegal.'" Id. (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975). "Standing is a threshold inquiry; it requires focus on the party seeking to have his complaint heard in a federal court, and *it eschews evaluation of the merits. The court is not to consider the weight or significance of the alleged injury; only whether it exists.*" Id. (emphasis in original) (citations omitted). Additionally, we must construe the complaint and all allegations therein in favor of the complaining party. Warth, 422 U.S. at 501.

Finally, we only need inquire whether any one of the parties has standing. Watt v. Energy Action Educ.

Foundation, 454 U.S. 151, 160 (1981). Because we find that the Brown children, through their father, have standing, we do not consider the standing of the other plaintiffs. Id.

1. Injury in Fact

The Plaintiffs must first establish that they have suffered an "injury in fact." This injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992). This assures that the courts are adjudging legal rights in actual "cases" or "controversies." Valley Forge, 454 U.S. at 471.

The Plaintiffs claim that the legislature enacted the child endangerment statute to protect children. They argue that by creating a "spiritual/religious" exemption, the legislature has denied certain children equal protection of the laws and violated the Establishment Clause by favoring certain religions. The Plaintiffs further claim the state has impermissibly based the protection children receive on their parents, religious beliefs. They claim that the classification stigmatizes the children and more importantly provides an immediate threat to their health and well-being.

While the Plaintiffs must present the Court with a threatened injury, "[o]ne does not have to await consummation of the threatened injury to seek relief." Blum v. Yaretsky, 457 U.S. 991, 1000 (1982) (quotation omitted). "[T]he question becomes whether any perceived threat to [Plaintiffs] is sufficiently real and immediate to show an existing controversy. . . ." O'Shea v. Littleton, 414 U.S. 488, 496 (1974). Several Ohio children have already died because they were denied adequate medical care due to their parents' religious beliefs. The threatened injury in the case at bar is real. See State v. Miskimens, 22 Ohio Misc. 2d 43, 49, 490 N.E.2d 931, 938 (1984) ("From what started as a common

childhood illness, from what started as a simple, easily recognizable, well-known bacterial infection which responds to the most basic of modern antibiotics, and at his home located within a few blocks of a modern, well-equipped emergency hospital, which could have, in all likelihood, saved his life, Seth Miskimens died. . . . the actions of these defendants in failing to provide for Seth the simplest of medical care, in effect, reduced Seth's chances of survival from nearly one hundred percent to less than one percent.").[2] Therefore, a denial of equal protection of the laws could injure, cripple or in the worst case cause a child's premature death. The standing doctrine does not demand that a court wait until the injury is complete, but only until it is threatened. Accordingly, the Plaintiffs have alleged adequate injury in fact.

2. Causation

Second, the Plaintiffs must establish that the injury is "fairly traceable to the challenged action . . . ." Allen v. Wright, 468 U.S. 737, 751 (1984). To do so, the Plaintiffs must show "a logical nexus between the status asserted and the claim sought to be adjudicated . . . Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power." Flast v. Cohen, 392 U.S. 83, 102 (1968).

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[2] See also Miskimens, 22 Ohio Misc. 2d at 49, 490 N.E.2d at 938 (cause of death - failure to obtain standard treatment for common bacterial infection); Lybarger v. People, 807 P.2d 570, 573 (Colo. 1991) (cause of death - failure to obtain standard treatment for bronchial pneumonia); State v. McKown, 475 N.W.2d 63 (Minn. 1991) (cause of death - failure to obtain standard treatment for diabetic ketoacidosis); Hall v. State, 493 N. E.2d 433, 434 (Ind. 1986) (cause of death - failure to obtain standard treatment for acute bronchial pneumonia).

The Plaintiffs contend that absent a religious exemption, the child endangerment statute would protect the two children here, as it does all other children. They argue that the exemptions lower the requisite standard of care and encourage medical neglect. In support of their argument, the Plaintiffs submitted several affidavits explaining how different religious groups utilize spiritual means to heal their children.[3] The Plaintiffs claim that "members of faith healing sects rely on the existence of the Exemptions for their decisions about medical treatment for their children." Plaintiffs' Brief at 23, document 30.

A key principal behind criminal law is deterrence of illegal conduct. The Plaintiffs argue the child endangerment statue would protect all children if no religious exemption existed. The act in this case is self-enforcing, because it does not require active participation or enforcement by state officers. The statute itself causes the immediate threat of injury. Therefore, the Plaintiffs' cause of injury correlates directly with the statute, and a sufficient nexus exists for the Plaintiffs to bring this claim.

3. Availability of Remedy

Finally, the Plaintiffs must show that a favorable decision will redress their injury. Allen, 468 U.S. at 751. If this Court found that the statute is unconstitutional, the Plaintiffs threatened injury would subside. First, the children would no longer be treated differently under the law due to their parents religion. Second, parents throughout Ohio would be on notice

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[3] Throughout this decision, we take what the Plaintiffs have said as true. Nothing, however, in this decision should be construed as interpreting the constitutionality of the statute. We do not in any way endorse or reject a specific means of healing children. We are only determining whether the Plaintiffs have put forth an adequate controversy before this court.

that denying their children adequate medical care is a punishable offense. Therefore, relief from injury will "likely" follow from this court issuing a favorable decision, and thus, the Plaintiffs have standing to bring this lawsuit against the Ohio Attorney General.

B. Eleventh Amendment Immunity

The Attorney General claims she is immune from suit under the Eleventh Amendment. The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of a Foreign State.

U.S. Const. amend. XI. The Eleventh Amendment applies to both suits brought against a State by its own citizens, as well as those brought by out of state citizens. Hans v. Lousisiana, 134 U.S. 1 (1890). While the amendment is far reaching, it "does not preclude actions against state officials sued in their official capacity for prospective injunctive or declaratory relief." Thonkol Corp. v. Department of Treasury, 987 F.2d 376, 381 (6th Cir. 1993) (citing Ex Parte Young, 209 U.S. 123 (1908)).

The Plaintiffs in this case allege that the statute is unconstitutional. Therefore, they seek prospective declaratory relief. The Eleventh Amendment does not bar such a suit. In Ex Parte Young, 209 U.S. at 159-60, the Supreme Court explained why claims for prospective injunctive relief are proper:

> The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

"Although the quoted language might suggest the contrary, claims for prospective relief still may be brought against state officers in their official, as opposed to personal, capacity." Doe v. Wiggington, 21 F.3d 733, 737 n.3 (6th Cir. 1994) (citing Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985)). Furthermore, the Supreme Court has stated that "[i]n an injunctive or declaratory action grounded on federal law, the State's immunity can be overcome by naming state officials as defendants." Graham, 473 U.S. at 169 n.18.

Accordingly, the Plaintiffs have properly filed a suit against the Ohio Attorney General. The Attorney General "is the chief law officer for the state and all its departments." Ohio Rev. Code Ann. § 109.02 (Page 1994). As we noted above, the statute in this case is self-enforcing. Therefore, if a portion of the statute is unconstitutional the problem of revoking that portion rests with the Attorney General. Accordingly, she is a proper party in this lawsuit.

CONCLUSION

For the foregoing reasons, we hereby GRANT the Hamilton County Prosecutor's and Cincinnati City Solicitor's Motion to Dismiss, but DENY the Ohio Attorney General's Motion to Dismiss.

SO ORDERED.

Dated: July 11, '95

s/s
S. Arthur Spiegel
United States Senior District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 95-3850

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC.; STEVEN M. BROWN; EVE BROWN; and HILLARY BROWN; and on behalf of a class of children in the state of Ohio similarly situated,

Plaintiffs - Appellees,

v.

JOSEPH T. DETERS, Hamilton County, Ohio, Prosecutor; FAY DUPUIS, Cincinnati, Ohio, City Solicitor, et al.,

Defendants,

and

BETTY MONTGOMERY, Attorney General of Ohio,

Defendant - Appellant.

Before: **Martin** and **Batchelder**, Circuit Judges;
Wiseman, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's holding that Attorney General Betty Montgomery has no Eleventh Amendment immunity is REVERSED. IT IS FURTHER ORDERED that the case is REMANDED to the district court with instructions to dismiss the action in its entirety.

ENTERED BY ORDER OF THE COURT

s/s _____
Leonard Green, Clerk

Issued as Mandate: September 30, 1996 A True Copy.

COSTS: NONE Attest,

Filing Fee ..... $
Printing ..... $

s/Valerie Fields _____

Total ..... $ Deputy Clerk

APPENDIX D

No. 95-3850

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC., ET AL.,	)	
Plaintiffs-Appellees,	)	
v.	)	
JOSEPH T. DETERS, ET AL.,	)	**ORDER**
Defendants,	)	
BETTY MONTGOMERY,	)	
Defendant-Appellant	)	

BEFORE: MARTIN and BATCHELDER, Circuit Judges; and WISEMAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/s

Leonard Green, Clerk

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*Hon. Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

APPENDIX E -- CONSTITUTION OF THE UNITED STATES

Article VI to the Constitution of the United States provides in relevant part:

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*

Amendment I to the Constitution of the United States provides:

> *Congress shall make no law respecting an establishment of religion . . .*

Amendment XIV to the Constitution of the United States provides in relevant part:

> *§ 1. . . .nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*

Amendment XI to the Constitution of the United States:

> ***Suits against states***
> *The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

APPENDIX F -- TABLE OF UNITED STATES STATUTES

28 U.S.C. § 1343:

"Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

***

> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of congress providing for equal rights of citizens or of all persons within the jurisdiction of the United Sates;
>
> (4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote."

28 U.S.C. § 2201:

"Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

APPENDIX G -- TABLE OF OHIO STATUTES

O.R.C. §2919.22 (1993 & Supp. 1995):

"Endangering children.

(A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. *It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.*" (Effective 1-1-74).

O.R.C. §2151.03 (1994):

"Neglected child defined; failure to provide medical care for religious reasons.

(A) As used in this chapter, "neglected child" includes any child;

(1) Who is abandoned by his parents, guardian, or custodian;

(2) Who lacks proper parental care because of the faults or habits of his parents, guardian, or custodian;

(3) Whose parents, guardian, or custodian neglects or refuses to provide him with proper or necessary subsistence, education, medical or surgical care or treatment, or other care necessary for his health, morals or well being;

(4) Whose parents guardian, or custodian neglects or refuses to provide him with the special care made necessary by his mental condition;

(5) Whose parents, legal guardian, or custodian have placed or attempted to place him in violation of sections 5103.16 and 5103.17 of the Revised Code;

(6) Who, because of the omission of his parents, guardian, or custodian suffers physical or mental injury that harms or threatens to harm the child's health or welfare;
(7) Who is subjected to out-of-home care child neglect.
(B) Nothing in this chapter shall be construed as subjecting a parent, guardian, or custodian of a child to criminal liability when, solely in the practice of his religious beliefs, he fails to provide adequate medical or surgical care or treatment for the child. This division does not abrogate or limit any person's responsibility under section 2151.421 [2151.42.1] of the Revised Code to report known or suspected child neglect, and children who are know to face or are suspected of facing a threat of suffering abuse or neglect and does not preclude any exercise of the authority of the state, any political subdivision, or any court to ensure that medical or surgical care or treatment is provided to a child when his health requires that he be provided with medical or surgical care or treatment." (Effective 8-3-89).

O.R.C. §2151.42:
"Prohibition against neglecting or mistreating child.
No person charged with the care support, maintenance, or education of a legitimate or illegitimate child or no person being the father of an illegitimate child under eighteen years of age shall fail to care fore, support, maintain, or educate such child, or shall abandon such child, or shall beat, neglect, injure, or otherwise ill-treat such child, or cause or allow him to engage in common begging. No person charged with the care support maintenance or education of a legitimate or illegitimate child under twenty-one years of age who is physically or mentally handicapped shall fail to care for, support, maintain, or educate such child. Such neglect, nonsupport, or abandonment shall be deemed to have been committed in the county in which such child may be at the time of such neglect, nonsupport, or abandonment. Each day

of such failure, neglect, or refusal shall constitute a separate offense." (Effective 9-2-63).

O.R.C. §2151.03:
"Neglected child defined.
As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "neglected child" includes any child:
[Subsections (A) through (E) omitted]
A child who, in lieu of medical or surgical care or treatment for a wound, injury, disability, or physical or mental condition, is under spiritual treatment through prayer in accordance with the tenets and practices of a well-recognized religion, is not a neglected child for this reason alone."

O.R.C. §109.02:
"The attorney general is the chief law officer for the state and all its departments and shall be provided with adequate office space in Columbus. Except as provided in division (E) of section 12-.06 of the Revised Code, no state officer or board, or head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law. The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, he shall prosecute any person indicted for a crime."

O.R.C. §109.14:
"When requested by them, the attorney general shall advise the prosecuting attorneys of the several counties respecting their duties in all complaints, suits, and controversies in which the state is, or may be a party."

O.R.C. § 109.16:

"The attorney general may prosecute an action, information, or other proceeding in behalf of the state in which the state is interested, except prosecutions by indictment, in the proper court of Franklin county, or of any other county in which one more of the defendants reside or may be found. No civil action, unless elsewhere specially provided, shall be commenced in Franklin county, if one more of the defendants do not reside or cannot be found therein, unless the attorney general certifies on the writ that he believes the amount in controversy exceeds five hundred dollars."

O.R.C. §109.51:

"There is hereby created in the office of the attorney general, a bureau of criminal identification and investigation to be located at the site of the London correctional institution. The attorney general shall appoint a superintendent of said bureau. The superintendent shall appoint, with the approval of the attorney general, such assistants as are necessary to carry out the functions and duties of the bureau as contained in sections 109.51 to 109.63, inclusive, of the Revised Code."

O.R.C. §109.71:

"There is hereby created in the office of the attorney general the Ohio peace officer training council. The council shall consist of nine members appointed by the governor with the advice and consent of the senate and selected as follow: One member representing the public; two members who are incumbent sheriffs; two members who are incumbent chiefs of police; one member from the bureau of criminal identification and investigation; one member from the state highway patrol; one member who is the special agent in charge of a field office of the federal bureau of investigation in this state; and one

member from the department of education, trade and industrial education services, law enforcement training."

O.R.C. §309.08:

"(A) ... In conjunction with the attorney general, the prosecuting attorney shall prosecute cases arising in his county in the supreme court, except for those cases required to be prosecuted by a special prosecutor pursuant to section 177.03 of the Revised Code or by the attorney general pursuant to section 109.83 of the Revised Code."

O.R.C. §309.15:

"On or before the first day of September in each year, if so required by the attorney general by a written notice given on or before the first day of August, the prosecuting attorney shall transmit to the attorney general a report of all crimes prosecuted by indictment or information in his county for the year ending the first day of July, specifying: ..."

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INCORPORATED
Box 2604
Sioux City, Iowa 51106

and

STEVEN M. BROWN, individually, and as the natural father and next friend of Hilary Brown and Eve Brown, minors, and on behalf of a class of children in the State of Ohio similarly situated,
c/o Suite 107
1601 East Highway 13
Burnsville, Minnesota 55337;

Plaintiffs,

vs

JOSEPH T. DETERS
Hamilton County Prosecuting Attorney
Courthouse
914 Main Street
Cincinnati, Ohio

FAY DUPUIS
City Solicitor
801 Plum Street
Cincinnati, Ohio 45202

CIVIL ACTION NO. C1-94-556

JUDGE SPIEGEL

SECOND AMENDED COMPLAINT

CLAIM OF UNCONSTITUTIONALITY OF STATUTE

CLASS ACTION - PLAINTIFFS

BETTY MONTGOMERY
Attorney General
30 East Broad Street
Columbus, Ohio 43266

Defendants.

JURISDICTION AND VENUE

1. This action arises under the Constitution of the United States and Title 42 U.S.C. §§1983 and 1988. Jurisdiction is conferred on this Court by 28 U.S.C. §§1331, 1343 and 2201.

2. Venue is proper in the Southern District of Ohio, where the defendants reside.

INTRODUCTION

3. Plaintiffs, individually and on behalf of all others similarly situated, seek to have the court declare facially unconstitutional two sections of the statutes of the State of Ohio: (a) Ohio Revised Code §2919.22(A), the second sentence thereof, and (b) Ohio Revised Code §2151.03(B), the first sentence thereof, both of which grant an exemption from criminal liability for child endangerment and child neglect to parents, caretakers, and persons in loco parentis who endanger or neglect the health or lives of children in accordance with certain religious beliefs. This exemption denies children and non-believing parents due process and equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and constitutes an establishment of religion in violation of the First and Fourteenth Amendments to the United States Constitution. Two Ohio state courts have previously held the exemption contained in O.R.C. §2929.22(A) unconstitutional. This action further seeks to

enjoin the prosecuting authorities in the State of Ohio from giving any recognition or effect to the exemptions.

PARTIES

4. Plaintiff Steven M. Brown is an individual residing in Nashua, New Hampshire. He has commenced this action on his own behalf, and on behalf of his two children, Eve, age 12, and Hilary, age 10, individually, and as representatives of a class of children in the State of Ohio similarly situated. Members of the class represented by these plaintiffs include those children residing in the State of Ohio whose parents, guardians, custodians, or persons in loco parentis practice treatment of the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

5. Plaintiff Children's Healthcare Is a Legal Duty, Incorporated, (CHILD), is a non-profit organization incorporated in 1983 under the laws of the State of Iowa. CHILD is an organization which is exempt under §501(c)(3) of the Internal Revenue Code of 1954. CHILD's purpose is stated in its by-laws:

> The Corporation's purpose is to fight child abuse and neglect associated with religious practices. The Corporation was formed because of the belief that children are entitled to equal protection under the law and that religion does not confer the legal right to cause or allow injury to children.

Some members of CHILD reside in the State of Ohio and are the parents, caretakers, or persons in loco parentis of children under the age of 18 years. Such members have no belief in the efficacy of spiritual treatment of children's illnesses through prayer alone.

6. Defendant Joseph T. Deters is the prosecuting attorney for Hamilton County, Ohio. He has the authority to prosecute criminal offenses under Ohio Revised Code §2919.22(A). Under O.R.C. §309.08, he prosecutes such offenses in Ohio appellate courts in conjunction with Defendant Montgomery. Defendant Deters is sued in his official capacity.

7. Defendant Fay Dupuis is the City Solicitor for Cincinnati, Ohio. She has the authority to prosecute misdemeanor criminal offenses under Ohio Revised Code §2919.22(A). Defendant Dupuis is sued in her official capacity.

8. Defendant Betty Montgomery is the Attorney General of the State of Ohio. The office of Attorney General is created by Ohio Constitution, Art. III, §1.

Defendant Montgomery is the chief law officer of the State of Ohio under O.R.C. §109.02. Her duties include appellate prosecution of offenses under §2919.22(A), in conjunction with county prosecuting attorneys, pursuant to O.R.C. §309.08.

Further, the Attorney General is required to prosecute any person indicted for a crime upon the written request of the governor, pursuant to O.R.C. §109.02. Within the office of the Attorney General are the Bureau of Criminal Identification and Investigation, which is authorized to engage in such activities as will aid law enforcement officers in solving crimes and controlling criminal activity, and the office of the Ohio Peace Officer Training Council, whose purpose is to assure the effective training of law enforcement officers throughout the state. County prosecuting attorneys are required annually to apprise the Attorney General in detail of criminal prosecutorial activity, pursuant to O.R.C. §309.15. The Attorney General is required to counsel a prosecuting attorney with regard to any suit, whether actual or prospective, involving the state, pursuant to O.R.C. §109.14. When

requested by the governor or the general assembly, she is required to appear for the state in any court or tribunal in which the state is directly interested, pursuant to O.R.C. §109.02.

CLASS ALLEGATIONS

9. Plaintiff Steven M. Brown, on behalf of his minor children Eve Brown and Hilary Brown, brings this action for declaratory and injunctive relief as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and S.D.OhioL.R. 23.3 as representatives of the class of all children in the State of Ohio, a) who are under the age of 18 years and who are in the custody or control of a parent, guardian, or person in loco parentis who provides treatment of physical or mental illness or defect by spiritual means through prayer alone, and b) who are under the age of 21 years and are mentally or physically handicapped, and who are in the custody or control of a parent, guardian, or person in loco parentis who provides treatment of physical of mental illness or defect by spiritual means through prayer alone, so that this case may proceed as a class action.

10. This class action is appropriate under Rule 23 (a) because:

(A) The members of the class are so numerous as to make it impracticable to bring them all before the Court. The approximate size of the class is unknown, but it is thought to exceed 1,000.

(B) There are questions of law common to the class, namely whether the exemptions deny the members of the class the equal protection of the laws under the Fourteenth Amendment.

(C) The claims of the representative parties are typical of the claims of the entire class because the representatives and all the members of the class have identical claims with respect to the constitutionality of the statutes.

(D) The representative parties will adequately and fairly protect the interests of each and every member of the class. Plaintiff Steven M. Brown is unusually qualified to represent the class of such children because, unlike most of the parents or guardians of such children, he is not a person who is entitled to claim the protection of the exemptions at issue herein, and therefore he has no interest which conflicts with obtaining an adjudication of the unconstitutionality of the statutes.

11. The prosecutions of separate actions by individual members of the class would create the risk of

(A) inconsistent or varying adjudications in different jurisdictions with respect to individual members of the class which would establish incompatible standards of conduct for defendants; and

(B) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the members not parties to the adjudications, or substantially impair or impede their ability to protect their interests.

12. The defendants' duties, responsibilities and discretion in criminal investigations and prosecutions under the challenged statutes are generally applicable to the class, thereby making appropriate final declaratory relief and corresponding injunctive relief with respect to the class as a whole.

FACTUAL ALLEGATIONS

13. The first statute in issue in this action, Ohio Revised Code §2919.22(A), provides as follows:

> (A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body. (emphasis supplied.)

14. The second statute at issue herein, a part of the juvenile code, O.R.C. §2151.03 (A)

(3) and (B) provides as follows:

> (A) As used in this chapter, "neglected child" includes any child: ...
>
> (3) Whose parents, guardian, or custodian neglects or refuses to provide him with proper or necessary subsistence, education, medical or surgical care or treatment, or other care necessary for his health, morals, or well being; ...

(B) Nothing in this chapter shall be construed as subjecting a parent, guardian, or custodian of a child to criminal liability when, solely in the practice of his religious beliefs, he fails to provide adequate medical or surgical care or treatment for the child. This division does not abrogate or limit any person's responsibility under section 2151.421 (2151.42. 1) of the Revised Code to report known or suspected child abuse, known or suspected child neglect, and children who are known to face or are suspected of facing a threat of suffering abuse or neglect and does not preclude any exercise of the authority of the state, any political subdivision, or any court to ensure that medical or surgical care or treatment is provided to a child when his health requires that he be provided with medical or surgical care or treatment. (emphasis supplied)

15. Plaintiff Steven M. Brown and Kim M. Strubbe, formerly known as Kim Brown, were divorced on October 27, 1987 by the Decree of Divorce issued by the Hillsborough County District Court in the State of New Hampshire.

16. Under the terms of the Decree of Divorce, the parties were awarded joint custody of the parties' minor children, Plaintiffs Eve Brown and Hilary Brown. Primary physical custody was awarded to Kim Strubbe, subject to reasonable periods of physical custody to the Plaintiff Steven M. Brown. While the children resided in the State of New Hampshire, Plaintiff Steven M. Brown visited with them weekly, and he was able to frequently observe the state of their health in order to protect them from endangerment and neglect by Kim Strubbe.

17. That subsequent to the Decree of Divorce, Kim Strubbe moved to the State of Ohio, County of Hamilton, and now resides there with the plaintiff two minor children. As a result of the move to Ohio, Plaintiff Steven M. Brown's

contact with the children became severely limited and he became unable to frequently observe the children to determine the state of their health in order to protect them from neglect.

18. That from time to time, as ordered in the Decree of Divorce, Plaintiff Steven M. Brown has had, and he intends to have in the future, the physical custody of his children both in the State of Ohio and elsewhere. Such physical custody renders him responsible to provide care, protection, and support to the minor children within the meaning of O.R.C. §2919.22(A) and medical care within the meaning of O.R.C. §2151.03(A)(3).

19. That Plaintiff Steven M. Brown has no religious belief in the spiritual treatment of children's illnesses through prayer alone, nor does he adhere to the tenets of any religion, organized or unorganized, recognized or unrecognized, which holds to the efficacy of spiritual treatment through prayer alone.

20. That one of the tenets of the religion known as Christian Science, to which Kim Strubbe adheres, is the efficacy of spiritual treatment of children's illness through prayer alone and to the exclusion of medical care.

21. That prior to the divorce of Plaintiff above described, Kim Strubbe practiced Christian Science spiritual treatment through prayer alone for illnesses of the minor children of the parties, to the exclusion of medical care and medical diagnosis. Plaintiff Steven M. Brown justifiably believes that such spiritual treatment to the exclusion of medicine will be provided to the children in the future to their detriment.

22. That upon the moving of Kim Strubbe from the State of New Hampshire to the State of Ohio, Plaintiff sought and obtained an amendment to the divorce decree in the courts of the State of New Hampshire to obtain medical safeguards for his children, requiring periodic medical checkups by a physician and requiring Kim M. Strubbe to report to him any illnesses of the children.

23. When it appeared to the plaintiff that Kim M. Strubbe failed to comply with the medical safeguards described in paragraph 22, Plaintiff Steven M. Brown sought and obtained a court order in Ohio which imposed additional duties upon Kim M. Strubbe in the form of medical safeguards for the protection of his children and notification of the hiring of a Christian Science practitioner for the children.

24. The lives and good health of the plaintiff minor children are threatened by the preference given by the State of Ohio in O.R.C. §§2919.22(A) and 2151.03(B) to spiritual treatment of children through prayer alone and the exemption from criminal liability provided to those who practice it on these plaintiff minor children. The minor child Eve has a congenital kidney problem which requires periodic medical checkups and observation, which Kim M. Strubbe has knowingly failed to provide. Immunization of the plaintiff minor children from common childhood diseases has also been neglected by Kim M. Strubbe.

25. In two decisions by Ohio Courts of Common Pleas, the spiritual treatment exemption at issue herein, O.R.C. § 2919.22(A), has been declared unconstitutional as a violation of the Equal Protection and Establishment clauses of the United States Constitution. However, in spite of the unconstitutionality of the exemption, both courts were compelled to dismiss the criminal prosecutions of defendants charged under the statute on due process grounds, because such defendants did not have fair notice of the unconstitutionality of the exemption.

26. As a result of the enactment by the State of Ohio of the two religious exemptions at issue herein, criminal prosecutions are deterred and no prosecution of a parent, guardian, or custodian of a child, who neglects or endangers the health of a child because of a religious belief, can result in a conviction because of the accused's right to due process. As a further result of the enactment of the religious exemptions

herein, the plaintiff class of children whose parents are believers in spiritual treatment of disease or defect through prayer alone has been denied the equal protection of the criminal laws.

COUNT ONE - EQUAL PROTECTION

27. Re-alleges paragraphs 1 through 26 above.

28. The exemptions provided by O.R.C. §§2919.22(A) and 2151.03(B) from criminal prohibition against child endangerment and neglect, in favor of parents or custodians who treat physical or mental illnesses or defects by spiritual means through prayer alone, create a suspect classification of children whose parents have religious belief in and practice such spiritual treatment on them to the exclusion of reasonable medical care. Because of the exemption, such children will never have the protection of the criminal laws of Ohio from parental endangerment for lack of medical treatment.

29. The denial of protection of the criminal laws of the State of Ohio to a class of children, based solely upon the religious beliefs and practices of their parents and caretakers, lacks a rational basis and does not further a compelling state interest, and thereby denies equal protection of the laws to those children whose parents have religious belief in and practice spiritual treatment of illness or defect through prayer alone, in violation of the Fourteenth Amendment to the United States Constitution.

30. Plaintiffs Eve Brown, Hilary Brown, and all of the plaintiff children are members of the class of children described in paragraphs 28 and 29 above. Such children have no adequate representation in the legislative body which created the exemptions at issue herein. The legal disability imposed on this class of children by the statutes at issue herein stigmatizes them, diminishes the value of their very lives and health from that of other Ohio children, encourages their

neglect and endangerment, and interferes with their family relationships.

By reason of the foregoing, O.R.C. §§2919.22(A) and 2151.03(B) deny these plaintiff minor children the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

31. Plaintiffs Eve and Hilary Brown have no adequate remedy at law to redress the irreparable deprivation of their constitutional rights by the State of Ohio described herein.

COUNT TWO - EQUAL PROTECTION

32. Re-alleges paragraphs 1 through 31 above.

33. The exemptions provided by O.R.C. §§2919.22(A) and 2151.03(B) from criminal child endangerment, in favor of parents or custodians who treat physical or mental illnesses or defects of children by spiritual means through prayer alone, create a suspect class of parents and caretakers of children who are subject to criminal penalties for child endangerment solely because of their lack of religious belief in spiritual treatment of children's illnesses through prayer alone.

34. The provisions in O.R.C.§§2919.22(A) and 2151.03(B) which create a parental standard of conduct for those who hold a religious belief, and a different, secular standard of conduct for all others, create a suspect class of parents which has no rational basis and does not further a compelling state interest, and thereby deny equal protection of the laws to the parents not favored by the religious exemption, in violation of the Fourteenth Amendment to the United States Constitution.

35. Plaintiffs Steven M. Brown and those members of CHILD described above, are members of the class of parents who have no religious belief in spiritual treatment of children's illnesses or defects by prayer alone; by reason thereof, O.R.C. §§2919.22(A) and 2151.03(B) deny them the equal protection

of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

36. Plaintiffs Steven M. Brown and CHILD have no adequate remedy at law to redress the irreparable deprivation of their constitutional rights by the State of Ohio described herein.

COUNT THREE - DUE PROCESS OF LAW

37. Re-alleges paragraphs I through 36 above.

38. The exemptions provided by O.R.C. §§2919.22(A) and 2151.03(B) from criminal child endangerment, and the resulting creation of the class of children who have no benefit of the protection of the criminal laws of the State of Ohio against child endangerment, interfere with the fundamental right of plaintiff minor children to have their lives, health, and family relationships free from government-sanctioned private interference, in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

39. The criminal exemptions at issue herein have encouraged and continue to encourage parents, guardians, and persons in loco parentis to use spiritual treatment of children's illness or defects, as a legal form of care, to the detriment of the plaintiff class of children, in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

40. The criminal exemptions at issue herein interfere with the fundamental right of Plaintiff Steven M. Brown to family relationships with his minor children free from government sanctioned private interference, in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

41. Plaintiffs have no adequate remedy at law to redress the irreparable deprivation of their constitutional rights by the State of Ohio described herein.

COUNT FOUR - ESTABLISHMENT OF RELIGION

42. Re-alleges paragraphs 1 through 41 above.

43. The exemption provided by O.R.C. §§2919.22(A) and 2151.03(B) from criminal prohibition against child endangerment, in favor of parents or custodians who treat physical or mental illness or defect by spiritual means through prayer alone, constitutes a preference, endorsement, and validation of the religious belief and practice of spiritual treatment of illness or defect, by the State of Ohio, in violation of the Establishment Clause of the First Amendment to the U.S. Constitution.

44. Plaintiffs Steven M. Brown and CHILD have no belief in the efficacy of spiritual treatment of children's illnesses through prayer alone, and they are subject to the stigma imposed by the statute, which elevates the religious beliefs of the exempt class over their own.

45. Plaintiffs Steven M. Brown and CHILD have no adequate remedy at law to redress the irreparable deprivation of their constitutional rights by the executive and judicial officers of the State of Ohio as alleged herein.

WHEREFORE, plaintiffs pray that this Court:

1. Issue a declaratory judgment adjudging the spiritual treatment exemptions of O.R.C. §§2919.22(A) and 2151.03(B) to be null and void;

2. Issue preliminary and permanent injunctions enjoining and restraining the defendants from enforcing, using, applying, or granting recognition to the spiritual treatment exemptions of O.R.C. §§2919.22(A) and 2151.03(B), and preventing the

defendants from dismissing any criminal action based on the existence of or reliance on the spiritual treatment exemptions;

3. Award Plaintiffs their costs of suit and their attorneys' fees under Title 42 U.S.C. Sec. 1988;

4. Issue an order determining the appropriateness of the action proceeding as a plaintiff class action pursuant to Rule 23(c).

5. Award such other and further relief that this court may deem just and proper.

Dated: April 10, 1995.

s/s
Robert J. Bruno
Trial Attorney for Plaintiffs
1601 E. Highway 13, Suite 107
Burnsville, MN 55337
612-890-9171

Dated: April 12, 1995.

s/s
Scott T. Greenwood
Ohio Atty. Reg. #0042558
Trial Attorney for Plaintiffs
2301 Carew Tower
441 Vine Street
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513-684-0101

Of counsel:

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612-890-9171

GREENWOOD & HUDSON
2301 Carew Tower
441 Vine Street
Cincinnati, OH 45202
513-684-0101

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served on all parties' counsel of record by regular U.S. Mail this 13th day of April, 1995.

s/Scott T. Greenwood

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INCORPORATED, ET AL.,	:	C-2-94-556
Plaintiffs,	:	Judge Spiegel
-vs-	:	
Joseph T. Deters, et al.,	:	
Defendants.	:	

STATE OF IOWA	)	
	) ss.	AFFIDAVIT OF
COUNTY OF WOODBURY	)	RITA SWAN

Comes now Rita Swan, being first duly sworn on oath, deposes and states:

Personal background

1. I am an individual residing in Bronson, Woodbury County, Iowa, with my husband, Douglas Swan. I make this affidavit in response to the Defendants' Joint Motion for Judgment on the Pleadings.

2. My husband Douglas and I were raised as Christian Scientists. We were devout and active members of the local and international Christian Science church until 1977. That year our son Matthew became sick with hemophilus influenzae meningitis. For twelve days we relied on Christian Science

"practitioners," who claimed they were healing him with spiritual "treatments."

3. On the twelfth day of his illness, the practitioner told us our son might have a broken bone and that Christian Scientists were allowed to go to a doctor for the setting of broken bones.

4. We went to the emergency room of a local hospital and told the doctors we wanted our son checked for a broken bone. Emergency neurosurgery was performed. Our son lived for a week in intensive care on a respirator and then died of a disease that has been routinely cured with antibiotic therapy since the 1940s.

5. We left the Christian Science church shortly after our son's death. We have worked to prevent religiously-based medical neglect of children for the past fifteen years. In 1983 we founded Children's Healthcare Is a Legal Duty (CHILD Inc.), a national membership organization focused on the problem of child abuse and neglect on religious grounds.

6. I am nationally recognized as very knowledgable on the issue. I have written several articles in distinguished peer-reviewed journals. I have testified before the U.S. Advisory Board on Child Abuse and Neglect, addressed many national conferences, and trained Iowa's child abuse investigators. A listing of my activities is attached as exhibit 1.

Christian Science opposition to health care

7. The following is a synopsis of what I have learned about Christian Science beliefs and practices on health care through my study of it both while I was a Christian Scientist and after I left the church. The following is not intended to hold these particular beliefs up to ridicule, nor those of other spiritual treatment sects, but rather to show the serious impact that this system as encouraged by the Exemptions in the criminal and juvenile codes of Ohio, has upon the plaintiffs.

8. The Christian Science church was founded in the late 19th century by Mary Baker Eddy. Church theology opposes drugs, surgery, medical diagnoses, study of disease, immunizations, food supplements, dieting, exercise programs, chiropractic, x-rays, metabolic testing of newborns, prophylactic eyedrops for newborns, and hygiene.

9. The basis for this opposition is the belief that matter and spirit are opposites. Christian Science believes that God is Spirit and created the world and all life as spiritual images of himself. The religion further argues that the material world and body are a lie, a counterfeit, an illusion, evil.

10. Christian Science claims that disease is caused by sin, alienation from God, and the belief that the material body and world are real. The sins and wrong thinking of parents are considered the cause of young children's illnesses. Disease is just a false belief or claim. The way to heal disease is to deny its existence and even deny that you can be aware of or impressed by its symptoms. For example, Elaine Ellis of Columbus, Ohio, writes in *The Christian Science Journal*, "My son's healing of rheumatic fever did not come until I stopped being alarmed at symptoms. Instead I denied them and prayed to know I couldn't be impressed by their seeming reality."[1]

11. The Christian Science church prohibits its practitioners from giving prayer treatments to those receiving medical care voluntarily.[2]

12. The Christian Science church's requirement that its members reject medical care is illustrated in a statement filed by a Christian Science defendant who was charged with felonies for allowing her daughter to die without medical care:

> Christian Science provides that no person may become a member of the Church unless he or she is prepared to rely completely on spiritual healing as practiced in Christian Science. Members of the Church believe that attempts to

use medical means as an adjunct to or in combination with spiritual means destroy a Christian Scientist's power to heal through prayer. Thus, spiritual healing is the sine qua non of Christian Science and a religious imperative for members of the Church.[3]

Church members who seek medical care are expected to resign from church offices. Church practitioners and teachers who do so will be suspended and thus deprived of their only source of income.[4]

Unlicensed health care

13. Eddy characterized her religion as a "system of medicine."[5] She chartered a college "for medical purposes" and graduated "doctors of Christian Science."[6]

14. She borrowed terminology from medical care for her own system. The church has "nurses" and calls its faith healers "practitioners," who take "patients," administer "treatments," and charge for their services on the scale of local physicians' fees. The treatments are prayers in the form of arguments and are usually given without seeing the patient or knowing what disease s/he has.[7]

15. At the turn of the century, the American Medical Association worked vigorously for legislation to restrict unqualified medical practitioners, including Christian Science practitioners. But, after decades of struggle, rulings in the cases of *People v. Cole* and *People v. Vogelgesang*[8] established that medical licensing requirements could not prevent people from praying for the sick or sending bills for their prayers. Today every state has a statute that explicitly exempts spiritual healers from the medical practice acts or defines the practice of medicine so as not to include their activities.

16. Since achieving those exemptions, the Christian Science church has worked for statutes giving the right to rely on its methods to the exclusion of medical care for both children and adults. It presents these methods as a "system of health care" that should be a legal substitute for the medical care needed by a sick child.[9] The church also works to protect its agents from potential liability for the unlicensed practice of medicine. The contemporary church has many times told its practitioners and nurses to "avoid doing anything which constitutes the practice of medicine."[10]

17. Various state statutes around the country grant religious exemptions to the following childhood immunizations, prophylactic eyedrops for newborns, metabolic testing of newborns, chest x-rays for public school teachers, treatment of venereal disease, physical exams for camps, schools, and athletic activities; study of disease in health classes, autopsies of children, child abuse and neglect charges, nonsupport of children, felony child endangerment, and involuntary manslaughter.

18. The Christian Science church recommends that its members use these exemptions. In a booklet of legal advice published by the church and distributed to all Ohio Christian Scientists, the Christian Science lobbyist and public relations manager for Ohio states: "It is important for these exemptions to be used, for lack of use thereof may indicate to school officials and legislators that Christian Scientists do not have a religious conviction sufficient to form the basis for such exemption."[11]

19. Later the booklet states,

> Christian Scientists, by invoking their legal rights, are often given opportunities to explain to others helpful facts about Christian Science. By exercising his rights the Christian Scientist is making a contribution to the

preservation and the strengthening of basic human rights which belong to men.[12]

20. The only formal education required to be a Christian Science practitioner is a two-week course. The church does not limit the diseases its practitioners may treat nor indicate any duty to advise parents when they are failing to heal a child.

21. The church used to conduct programs for training Christian Science nurses and home aides. However, a few months after the church and one of its nurses were sued for their involvement in the death of a diabetic child, the church announced the cancellation of its training programs. The church stated that its officials had determined that "preparation for Christian Science nursing" was "an essentially individual activity" and, therefore, those who want to be Christian Science nurses should decide for themselves what training they need and go get it.[13]

22. Christian Science nurses are not state-licensed nor do they work under the supervision of state-licensed personnel. Indeed, the church requires its nurses to revoke any medical licensure they may have obtained before they converted to Christian Science.[14]

23. Church literature indicates that the nurses bathe patients, help them move about, prepare meals, bandage wounds, make beds, read Eddy's writings to them, and sing to them.[15] The church forbids the nurses to give "any physical application beyond the normal measures of cleanliness."[16] Christian Science rejects not only drugs, but also the simplest human measures for relieving suffering or discomfort, such as hot packs, ice packs, enemas, and backrubs. The nurses cannot take a pulse or use a fever thermometer.[17] According to church theology, any reliance on matter to assess or maintain health or to make one more comfortable is evil.[18] The prohibitions also help protect the nurses from charges of unlicensed medical practice.

24. The church tells its practitioners and nurses not to report cases of suspected communicable diseases to health authorities. "The practitioner or nurse must avoid any appearance of attempted diagnosis, since to do so would be to engage in the unlawful practice of medicine," the church states.[19]

25. The church has been quite successful in obtaining third-party reimbursements for the charges of Christian Science nurses and practitioners despite their lack of training and accountability. Scores of prominent insurance companies reimburse for such charges. Many insurance plans for government employees also reimburse for these charges. Medicare and Medicaid reimburse for the church's nursing care.

Other religions that object to medical care

26. Christian Science is not the only religion that believes in spiritual treatment of children's illnesses to the exclusion of medical care. CHILD Inc. has reports in its files of preventable deaths of children in 17 sects since 1980: Faith Assembly, Christian Science, The Believers' Fellowship, Faith Tabernacle, Church of the First Born, Jehovah's Witnesses, Church of God of the Union Assembly, Church of God Chapel, Faith Temple Doctoral Church of Christ in God, Christ Miracle Healing Center, Jesus through Jon and Judy, Northeast Kingdom Community Church, Christ Assembly, The Source, True Followers of Christ, End Time Ministries, and fellowships without names.

27. Several of these sects, including those active in Ohio, espouse "positive confession theology," which teaches that the crucifixion of Christ was a vicarious atonement for both sin and disease. In their view all disease is a sinful temptation presented by the devil. Church members are expected to claim their redemption from sickness in a ritual often called

"pleading the blood of Jesus," argue against the devil, believe that they are already healed, and ignore all symptoms to the contrary.

28. Kenneth Hagin, who developed positive confession theology, states:

> If a person acts upon the Word of God, they will ignore what this outward man tells them. The body may tell them that the symptoms are still there, even the pain or the misery, or whatever it is. But instead of walking by natural, human faith, you walk by Bible faith. I have seen people with conditions that the doctors said could never be cured, but as I opened the Word to them, I have seen them with every symptom still present say, "I'm healed...." Many of [those people] are alive and well today with no symptoms of the disease whatsoever. Yet, when they acted in faith and made their confession, they had every symptom.[20]

29. This theological demand to ignore symptoms is illustrated in the case of a 12-year-old Columbus, Ohio, girl named Christine Smith. She suffered broken bones, cuts, bruises, and internal injuries after falling 65 feet from a railroad trestle near Whitehall. But her family insisted she had already been healed and would not get medical care for her:

> "The Lord Jesus saved her life," said her 19-year-old brother, Darren, who witnessed the accident. He said the family belongs to a small religious group which believes God has healed Christine. "He has already healed her. In my eyes, she is perfectly fine," he said.
>
> The family, which lives at 141 Woodcliff Dr., would not allow rescue workers to take Christine to the hospital until after officials obtained a court order, more than four hours after she fell.[21]

30. The Jehovah's Witnesses do not espouse faith healing. Today their only objection is to blood transfusions. They base their opposition on Bible verses such as Genesis 9: 3-6, Leviticus 17: 10, 11, and Acts 15: 22-29, which require abstinence "from blood."

31. The Witnesses' governing body, the Watchtower Society, says that these commands are a "fundamental ethical [norm]."[22] The soul is in the blood, and Christ presented a perfect atonement for the sins of all mankind by shedding his blood. To accept a blood transfusion or to eat blood, as the Bible phrases it, shows disrespect for the sacrifice of Christ and one's spiritual identity. The Watchtower says that blood transfusions "[trample] on the Son of God."[23]

32. Accepting a blood transfusion jeopardizes one's spiritual salvation and can be grounds for disfellowshipping. Church members are forbidden to have contact with disfellowshipped persons, even if they are blood relatives.

Risks to children associated with sects that oppose medical care

33. The pressures on parents in sects that oppose medical care are, from my observation, enormous. The disfellowshipping described above is a severe punishment for Jehovah's Witnesses. The dangers to their children are, however, reduced by the fact that Jehovah's Witnesses take their children to physicians regularly and therefore, physicians usually become aware of the need for blood transfusions and can obtain timely court orders for them.

34. But faith-healing sects such as Christian Science and certain charismatic groups oppose virtually all medical care and medical diagnosis. Their children's illnesses are not likely to come to the attention of the state in a timely manner.

35. Furthermore, members of faith-healing sects are trained to deny diseases as illusions or demonic temptations. Their theology requires them to trivialize symptoms. They are told that getting their child healed depends on their fidelity to the religious doctrine, and in a crisis, they can become very dependent on it.

36. The Christian Science church's rule that a person who voluntarily accepts medical care cannot receive the church's spiritual treatments is, on the basis of my experience, extremely coercive.

37. Statutory religious exemptions contribute to the pressures on parents. The Christian Science church, in particular, tells its members that the exemption statutes and the third-party reimbursements for their "spiritual health care" indicate that the insurance industry and public officials recognize Christian Science methods as effective treatment for all diseases of children.[24]

38. Parents who withhold medical care on religious grounds may not comprehend the risks they are taking with their child's life when they believe that the state endorses their behavior.

Relationship of statutes to religious behavior

39. Many think that people with religious objections to medical care will withhold medical care regardless of secular laws. The defendants argue in the instant case that "there is no causal connection between the alleged injury and either a state wrong or a federal remedy" and that "hypothetical future criminal conduct on the part of Kim Strubbe. . . is not fairly traceable to the existence or nonexistence of R.C. 2919.22(A)."[25]

40. There is, however, evidence that clear laws do change religiously-motivated behavior. CHILD Inc. has a data base of 170 children who died after medical care was withheld

on religious grounds since January, 1975. The data base is not comprehensive; we suspect the actual number of deaths nationwide is much higher. Nevertheless, we offer the following point in evidence. All states except South Dakota, Hawaii, Massachusetts, and Maryland have a statutory religious exemption either in their child abuse and neglect laws or the criminal code or both. Children from whom medical care was withheld on religious grounds died in South Dakota, Hawaii, Massachusetts, and Maryland when those states had religious exemptions from a duty to provide medical care to a sick child. But since the four states repealed those religious exemptions, only one child's death from religiously-based medical neglect in them has come to our attention. Furthermore, the child died of a vaccine-preventable disease and the four states still have religious exemptions from immunizations.[26]

41. There is also considerable evidence that parents claim the religious exemption statutes as a justification for withholding medical care. Since 1982 criminal charges have been filed in 44 cases of religiously-based medical neglect of children. In the majority of these cases, the parents have argued that a state religious exemption statute led them to believe they had the legal right to withhold medical care.[27]

42. Finally, there is evidence that prosecutions change religiously-motivated behavior. In the 1970s a faith-healing sect first called the Glory Barn and later Faith Assembly arose in Kosciusko County, Indiana. Child after child died, but the prosecutor publicly stated that religious exemption statutes gave the parents a right to withhold medical care.[28]

43. In 1984, prosecutors began filing charges on these deaths in neighboring counties. They won convictions that were (with perhaps contorted statutory construction) upheld on appeal. The Kosciusko County prosecutor then began filing charges on some of the deaths in his county.

44. Deaths of children in Faith Assembly slowed dramatically. The Indiana Board of Health and the Center for Disease Control published a study indicating that the mortality rate among Faith Assembly infants from birth to one month old in two Indiana counties from 1975-1982 was 300% higher than for the state as a whole.[29] A followup study for the years 1983-1985 indicated that the mortality rate among Faith Assembly infants from birth to one month old in the same two counties was only 150% higher than the statewide rate.[30] "These findings suggest," said the researchers, "that public health and legal surveillance have an important role in the prevention of medical neglect."[31] CHILD Inc. believes that the death rate of children associated with Faith Assembly has continued to decline since 1985.

45. The former Mercer County Prosecuting Attorney Dan Myers states in an accompanying affidavit that he knows of no deaths from religiously-based medical neglect since he prosecuted Steven and Diane Miller and ORC2919.22a was ruled unconstitutional in Mercer County. The Coshocton County Prosecuting Attorney Bill Owens has told CHILD President Rita Swan that he knows of no children's deaths from religiously-based medical neglect since the prosecution of Larry and Roberta Miskimens and the ruling that ORC2919.22a was unconstitutional in Coshocton County.

46. Many chuch officials in faith-healing sects, including Christian Science, advise their members to "render unto Caeser the things that be Caeser's."[32] Many parents are relieved of the onus of breaking moral laws when the state makes its standards clear.

47. As one example, consider a Hamilton, Ohio, case in 1987. Three-month-old Susan Gray needed surgery to remove a life-threatening abdominal cyst. Her parents David and Debra Gray objected to the surgery on religious grounds. Butler County Juvenile Court Judge David Niehaus ordered the surgery over their objections. According to the press,

"Niehaus said he would like to have seen the family resolve the problem themselves and said at one point it appeared that might be possible. He said the parents indicated during the entire proceedings that they would follow the law and do whatever the court might order, but found it difficult to make a decision because of their religious beliefs."[33]

48. "They have been waiting five years for a girl and there is no question they don't want to lose her," Niehaus added.[34]

Christian Science position on secular law

49. In England and Canada, the Christian Science church accepts the fact that national laws require parents to provide medical care for their children and advises its members to obey them.[35]

50. In the United States, however, the church has been determined in its view that Christian Science is a legal alternative to medicine and that its practitioners and nurses should not have to report contagious diseases or cases of sick children without medical care to state agencies. From my observation, the church willfully misrepresents the laws to its members and agents to give the impression that the former have the legal fight to use Christian Science treatment instead of medical care when their children are sick or injured and that the latter have no reporting obligations.[36]

51. The Christian Science church has a salaried lobbyist and public relations manager in every state. Members are told to rely on this person for legal guidance when their children are ill.[37] Furthermore, the church has published booklets of legal advice for members in every state.

52. The church tells its members to obey secular laws.[38] The several hundred Christian Scientists I have known personally have wanted to obey the laws of the country and have perceived of themselves as law-abiding citizens. But they

trust their church to tell them what the laws are and what they mean.

53. CHILD Inc. has Christian Science church booklets of legal advice for members in 17 states. None of the booklets tell parents they have or even might have a legal obligation to provide medical care for their sick children. Even though Iowa and Ohio are the only states with a religious defense to manslaughter, the Christian Science church does not advise parents that they might be indicted for manslaughter in any of the 17 states if they let their child die without medical care. Indeed, the church encourages them to believe they have a legal fight to withhold medical care in all those states.

54. For example, in 1971, the Christian Science church obtained an ambiguous religious exemption to a misdemeanor nonsupport charge in Massachusetts. In its subsequent booklets of legal advice, Nathan Talbot, the Christian Science church's lobbying and public relations manager, who is also a lawyer, quoted the exemption and then stated: "This is a criminal statute and it expressly precludes imposition of criminal liability as a negligent parent for failure to provide medical care because of religious beliefs."[39] By promoting this supposed exemption to criminal liability and by not quoting any statutes requiring medical care of children, Talbot gave the impression that Christian Scientists in Massachusetts had an unlimited fight to withhold medical care.

55. In 1986 a Boston-area toddler, Robyn Twitchell, began screaming in pain and vomiting. By the second day of his illness his Christian Science parents, Ginger and David Twitchell, were calling the public relations manager, Mr. Talbot, for advice, as the church directs them to do. Judge Lawrence Shubow, who conducted an inquest into Robyn Twitchell's death, reported as follows about Talbot's advice:

> The court finds on the whole record that Mr. Talbot supported and encouraged all concerned to rely

exclusively on spiritual healing and declined to suggest any other options, including those not necessarily inconsistent with Christian Science. . . . This was an interference with the natural parental instinct to seek other help from any available source.[40]

56. After their baby died of a bowel obstruction, the Twitchells were charged with and convicted of manslaughter. Mr. Twitchell publicly stated that knowing the law would have changed their actions.[41]

57. The edition of the church's booklet, *Legal Rights and Obligations of Christian Scientists under the Laws of Ohio*, in CHILD's possession "brings the subject matter up to and including the Acts of the 1971 Ohio General Assembly." It therefore does not discuss the religious defense at ORC2919.22A, which became law in 1974.

58. It does, however, present a religious exemption in the civil code at ORC 2151.03 as giving Christian Science parents the right to withhold medical treatment from children. The booklet acknowledges that the courts may order medical care for children, but gives the impression that Christian Science parents have no obligation to provide medical care for them. In fact, it tells the parents to, in essence, lie to inquiring public officials. The church's legal advice for parents of sick children is attached as exhibit 2.[42]

59. Thus, parents are assured by their church that Christian Science qualifies as a legal alternative to medical care called "other remedial care." But they are also told to describe it to inquiring public officials as "good care" and "treatment for the illness" and not to use Christian Science parlance for disease such as a false "belief" or "claim."

60. At another point the Ohio booklet advises:

In children's cases, it is important for parents to give earnest consideration to engaging a practitioner listed in

The Christian Science Journal, since State statutes accord some recognition to such practitioners. Furthermore, arrangements should be made for a practitioner to visit any child promptly who is being treated for a condition which may be deemed serious, and for the practitioner to make such visits frequently if necessary. Christian Scientists understand that total reliance on God is the safest and most scientific system of healing, and the rights of Christian Scientists to select Christian Science treatment for their children in lieu of medical treatment will continue to be respected so long as inquiries by public officials are not ignored and are answered ,with genuine appreciation for their concern and with assurance that effective care is being given the children.[43]

61. The Christian Science church's understanding of Ohio's religious defense to felony child endangerment and manslaughter, ORC 2919.22a, is well illustrated in the amicus it filed in *State v. Miskimens*, 22 Ohio Misc.2d 43, 490 N.E.2d 931 (Ohio Com. Pl. 1984). The amicus brief says that no prosecution of a parent who withholds medical care from a sick child and prays for the child instead can be upheld in Ohio. It says ORC 2919.22a "prevent[s] parents from abusing their children" by limiting its privileges to a certain kind of spiritual healing. It claims that Christian Science methods have an "established reputation for effectiveness in the secular world" out of "respect" for which the Ohio legislature enacted ORC 2919.22a.[44]

No parental duty

62. As illustrated by the above discussion of the booklet *Legal Rights and Obligations of Christian Scientists under the Laws of Ohio* and the amicus in *State v. Miskimens*, the

Christian Science church promotes the concepts that its Ohio parents have a legal right to withhold medical care, that a court order for medical care is the state's only way of getting medical care to a child, and that parents should therefore try to conceal their children's illnesses from authorities.

63. Religious shield laws such as ORC 2919.22a certainly encourage those concepts not only among members of faith-healing sects, but public officials as well. Coroners, law enforcement, and the child welfare bureaucracy have assumed in many Ohio cases that parents have no legal obligation to provide medical care for a sick child if they belong to certain churches.

64. The case of Christine Smith cited on page 8 above illustrates the assumption that a court order is the only way to protect Ohio children associated with faith-healing sects. The child was severely injured, but received no medical care until a court order was obtained more than four hours after she fell 65 feet. We could not find any followup press coverage on whether she survived.

65. In July, 1983, Roxanne Crockett of Columbus, Ohio, gave birth to twin girls at home without medical attention. Crockett belonged to the Overcoming Faith Ministries, which recommended home births without the help of state-licensed health care providers. Amanda Crockett died of cerebral anoxia because the umbilical cord was wrapped around her neck. After the Crocketts called the morgue to report Amanda's death, officials came to the home to check on the welfare of the other baby, Abigail.

66. According to the *Dayton Daily News*, "Officers and medics who went to the home were met by the Crocketts, who informed them of their religious beliefs and indicated they would neither assist nor resist them."[45]

67. The surviving baby weighed less than two pounds. The police took her to the emergency room of a local hospital.

68. Juvenile Bureau Officer David Ross reported that the family said "they believed in the healing power of God." Ross further said that no charges would be filed because "in light of their religious beliefs and family history, you can't say there was any abuse or neglect in the home."[46]

69. This is the prevailing attitude when Ohio children die after medical care is withheld on religious grounds. Ohio public officials almost never consider these deaths potential criminal cases. In October, 1979, 11-year-old Christian Science child Ronald Rowan died in Warren, Ohio, with no medical attention. The cause of death was aspiration asphyxiation. In layman's terms, he strangled in his own vomit because he was too weak to expel it. But the coroner did not rule the death a homicide.

70. A local emergency room physician, Dr. Thomas Haynes, contacted the coroner's office shortly after the autopsy report on Ronald Rowan's death was completed. Haynes told CHILD President Rita Swan that the coroner reported that the boy's body was 30 to 40% dehydrated and that he had to have been vomiting frequently for several days and exhibiting other symptoms of a serious illness to become so dehydrated. The Trumbull County Coroner's Office cannot now locate the autopsy report, but the death certificate and case report sheet are attached as exhibits 3 and 4.

71. Perhaps the most blatant strategizing by a church with regard to Ohio's religious exemption laws was in the case of Glen Vanderpool in 1979. After the 6-year-old Willoughby boy was absent from school for three months, a school nurse investigated and found the boy's leg was swollen to 14 inches diameter at the knee and he could not walk. His Christian Science parents refused to provide medical care because of their religious beliefs and said the boy had only "a sore foot."[47]

72. The Lake County Welfare Department petitioned the court to order medical care. The boy's "condition was so serious that the Welfare Department, with approval of the

court, had an ambulance standing by at the boy's home to rush him to the hospital if the decision went that way."[48] A court order for surgery and medical care was obtained over the parents' religious objections, but the boy died of bone cancer within three months.

73. The lobbyist and public relations manager for the Christian Science church in Ohio, William Evans, said, "The biggest point is that this is not a neglect case," and the press called the parents "law-abiding."[49]

74. And after allowing the child to get in such horrible condition over several months time, Evans told the press that the church was not opposed to medical treatment for the boy and the only reason it was obtained through court order was that the mother was indigent. "We believe in healing through prayer, and we would not normally seek medical attention. But in this case I advised the mother we should and she agreed," said Evans.[50]

75. I conclude from the church's handling of this case that the church and the parents wanted medical care withheld regardless of how terrible the boy's condition was, but when it became a public relations problem and the family court intervened, Evans advised the mother to comply with the court order.

CHILD's work against Ohio's religious exemption laws

76. CHILD Inc. officers and members worked enormously hard for repeal of Ohio's religious exemptions in ORC 2151.03, 2151.421, and 2919.22 from 1982 to 1989. The exemption in ORC 2151.03 stated, "A child who in lieu of medical or surgical care or treatment for a wound, injury, disability, or physical or mental condition, is under spiritual treatment through prayer in accordance with the tenets and practices of a well recognized religion, is not a neglected child for this reason alone." The exemption in ORC2151.421 stated:

"Nothing in this section shall be construed to define as an abused or neglected child any child who is under spiritual treatment through prayer in accordance with the tenets and practice of a well-recognized religion in lieu of medical treatment, and no report shall be required as to such child."

77. In 1974, the U. S. Department of Health, Education, and Welfare began a policy of requiring states to enact a religious exemption to child abuse and neglect charges as a condition of obtaining federal funds for child abuse and neglect prevention and treatment programs.[51]

78. My husband and I made three trips to Washington and wrote approximately fifty letters to Congress, HEW, and its successor the U. S. Department of Health and Human Services (HHS) to protest this federal policy.

79. In 1983 HHS removed the religious exemption from federal mandate, while allowing states to keep it, and also announced a new eligibility requirement that states include failure to provide medical care in their statutory definitions of child neglect.[52]

80. CHILD asked a Congressman to inquire as to how HHS could allow religious exemptions to remain in state civil codes and also implement a medical care requirement.

81. HHS told the Congressman that the Department would allow a religious exemption from adjudication as a negligent parent, but would not allow one from a duty to report a child in need of treatment to Protective Services, from the state's investigation of such a case, or from the court's authority to order medical care for the child.[53]

82. CHILD then asked HHS to require the removal of ORC 2151.421 since it stated that cases of religiously-based medical neglect did not need to be reported to Protective Services.[54]

83. HHS refused to require change in ORC 2151.421. CHILD wrote again to HHS complaining that HHS was not

enforcing its standards.[55] Congressman Berkley Bedell also wrote to HHS with the same complaint.[56]

84. HHS reviewed Ohio's laws again and subsequently told CHILD by phone that they would require Ohio to remove the last nine words of the exemption in ORC 2151.421.

85. Rep. Paul Jones, D-Ravenna, added an amendment to repeal the entire sentence with the exemption in ORC 2151.421. He added it to a child abuse bill sponsored by Senator Lee Fisher, D-Cleveland. Ohio CHILD members encouraged Jones in that initiative. Jones asked CHILD President Rita Swan to prepare a paper on injuries to Ohio children associated with faith-healing sects. He later distributed the manuscript to several legislators.

86. After devotees of spiritual healing expressed opposition to repeal, Fisher demanded that the amendment be removed from his bill. Shortly, thereafter, the Ohio legislature did the minimum required to remain in compliance with federal regulation and removed the last ten words of the exemption in ORC 2151.421.

87. In 1985 Jones developed his own bill, HB67, which allowed parents to withhold medical care on religious grounds in each of the three exemption statutes above unless "the failure to provide the medical or surgical care or treatment results in serious physical harm to the child." Jones wrote to CHILD President Rita Swan enlisting her help and saying that she would "prove to be one of our most valuable resources in this endeavor."[57]

88. A subcommittee of the House Children and Youth Committee held five day-long hearings on the bill. CHILD President Rita Swan came to testify for the bill in March 1985. Ohio CHILD members testified about injuries to themselves and their children because of Christian Science and charismatic beliefs against medical care. CHILD also provided information to proponent groups. CHILD members met with legislative staff in their offices to advocate passage of the bill.

89. The Christian Science church was the only organization to testify against the bill.

90. The bill passed the subcommittee, but the committee chairman tabled it, thus killing it for the 1985-86 session.

91. In 1986 CHILD held a meeting in Toledo. A substantial portion of the meeting was used for planning advocacy work for the repeal of the religious exemptions.

92. The Ohio Committee for Child Healthcare Rights was formed in 1986 to lobby for repeal. Its Executive Director, C. J. Saalman, worked closely with CHILD, and CHILD provided some funding for the Committee's activities.

93. In 1987 Jones presented another bill, HB63, this one repealing the religious exemptions in ORC2151.421, ORC2151.03, and ORC2919.22A. CHILD President Rita Swan and a Toledo CHILD member came to Columbus for several days in January to lobby for the bill. The Health Committee held extensive hearings on the bill in Celina and Columbus. Again, several Ohio CHILD members testified for the bill, both as victims of spiritual healing belief systems and as professionals.

94. Organizations supporting the bill included:

Ohio State Medical Association
Ohio Chapter of the American Academy of Pediatrics
Ohio Nurses Association
Ohio League Against Child Abuse
Ohio Children's Trust Fund
Ohio Council of Churches
Ohio Civil Liberties Union
Ohio Prosecuting Attorneys Association
Ohio Federation of Police
Ohio Chapter of the National Association of Social Workers
Ohio Civil Services Employees Association
Ohio Committee for Child Healthcare Rights
Central Ohio Chapter of American Atheists

Children's Services Association
Ohio Association of Child Caring Agencies
Ohio Youth Services Network.

CHILD members made presentations to at least five of these organizations to obtain the endorsements.

95. Two departments of state government also lobbied for the bill: the Ohio Department of Health and the Ohio Department of Human Services.

96. The repeal bill passed the Health Committee, but never went to the floor for a vote.

97. On February 23, 1987, CHILD filed an amicus curiae brief in *State v. Miller*, Mercer County Court of Common Pleas, cases # 86-CRM30 and CRM31, asking the court to rule ORC2919.22a unconstitutional.

98. On May 20, 1987, HHS advised Ohio that its religious exemptions in the juvenile code placed the state out of compliance with federal regulation. HHS reported that it had conducted yet another review and found that removing the last ten words of the ORC 2151.421 exemption had removed only the "explicit" exemption to a reporting duty, while the remaining words of the sentence as well as the exemption in ORC 2151.03 still conveyed an "implicit" exemption to such a duty. [58]

99. In 1988 Ohio lost about $700,000 in federal money because of the legislature's unwillingness to act.

100. In 1989 Jones introduced the repeal bill again. Hearings were held for a third legislative session. CHILD President Swan came to Columbus to testify again. Several Ohio CHILD members testified. Toledo CHILD member Naomi Twining presented more than a thousand signatures on petitions for the bill.

101. But the legislature chose again to do the bare minimum to restore Ohio's federal funding. On July 13, 1989,

it repealed the exemptions in ORC 2151.421 and 2151.03, added a religious exemption to 2151.03 that HHS would not contest, and left the exemption in ORC 2919.22A intact.

102. During the seven-year struggle for repeal of Ohio's religious exemption laws, CHILD President Rita Swan wrote more than 390 letters in support of that objective; other CHILD members and donors wrote over 200 letters supporting that goal.[59] Additionally, CHILD members and donors wrote 13 letters that were sent to every Ohio state representative or every member of a key committee, while the Ohio Committee for Child Healthcare Rights sent 8 letters to every Ohio state representative. The committee also sent letters to major Ohio radio and television stations and newspapers. CHILD members made twenty appearances before Ohio legislative committees to testify for repeal bills. CHILD members wrote columns in Ohio newspapers, gave media interviews, made personal visits to legislators and their staffs, and met with proponent groups.

103. We estimate that at least 5% of CHILD's expenditures between 1983 and 1989 went to remove or modify Ohio's religious exemption laws at ORC 2919.22a, 2151.421, and 2151.03. CHILD's total expenditures from 1983 to 1989 inclusive were $48,836. We estimate that at least $2400 of that went for our work on Ohio's laws. CHILD's officers and members work without compensation, and most of the members did not receive compensation even for their expenses.

Summary

104. Some churches advocate withholding medical care from children and claim that their prayers are recognized by the state of Ohio as a legal substitute for medical care of sick children. ORC2919.22a, providing a religious defense to felony child endangerment and involuntary manslaughter, and

other statutory religious exemptions have encouraged Ohio parents to withhold medical care on religious grounds.

105. CHILD worked very hard for repeal of ORC2919.22a, but did not succeed.

106. Certified copies of death certificates of Ohio children who are known by CHILD Inc. to have died after medical care was withheld on religious grounds are attached as exhibit 3. The case workup sheet on Ronald Rowan's death is exhibit 4.

FURTHER YOUR AFFIANT SAYETH NOT.

s/s _____
Rita Swan

Subscribed and sworn to before me this 25th day of April 1995.

s/Donna M. Lahn _____
Notary public
Woodbury County, Iowa

[1]Elaine Ellis, Testimony, *The Christian Science Journal* December 1977: 715.

[2]William Lee, Practitioners Division Manager, Letter to Christian Science practitioners, October 1971.

[3]Petition for Writ of Certiorari, *Walker v. Superior Court of Sacramento County* U.S.S. Ct. 88-1471 1989.

[4]Russell Chandler, "Lawsuits, dissension rack church," *The Los Angeles Times* 3 Sept. 1984: 1; Carolyn Swan, "Radical reliance and the church member," *The Christian Science Sentinel* 11 Apr. 1983: 623-6.

[5]Eddy, *Miscellaneous Writings.* In: *Prose Works* 243, 284.

[6]Eddy, *Retrospection and Introspection.* In *Prose Works* 48; Eddy, *Miscellany* 245.

[7]Eddy, *Science and Health* 198, *Miscellaneous Writings* 252.

[8]*People v. Cole*, 113 N.E. 790 (1916); *People v. Vogelgesang*, 116 N.E. 973 (1917).

[9]Hearings on HR3394, HR3411, and HR3814 before Subcom. #3 of the House Committee on the Dist. of Columbia, 89th Cong., 1st Session 36 (1965): 36.

[10] *Legal Rights and Obligations of Christian Scientists under the laws of Ohio* (Christian Science Committee on Publications for Ohio, 1972?): 16. The church publishes similar booklets of legal advice for every state. They will hereafter be cited as *Legal Rights* and their authors as CSCOP.

[11]*Ibid.*: 26.

[12]*Ibid.*: 45.

[13]Christian Science Board of Directors, "Fresh insights into Christian Science nursing," *The Christian Science Journal* November 1991: 34-5.

[14]*Christian Science Nurses Training Catalog* (Boston: First Church of Christ, Scientist Department of Care, n.d.) 14.

[15]*CS Nurses Training Catalog;* Alfie Kohn, "Mind over Matter," *New England Monthly* March 1988: 63.

[16] *Facts about Christian Science* (Boston: CS Pub. Soc., 1959) 9.

[17] Carolyne K. Davis, Letter to Congressman Berkley Bedell, 23 November 1983.

[18]Eddy, *Science and Health* 42 1.

[19]See for example *Legal Rights Minnesota* (St. Paul: CSCOP for Minnesota, 1976): 14. The church does tell parents to report suspected communicable disease, but few would have reason or knowledge to do so given the theology's demand to avoid medical information and to insist that disease is an illusion.

[20]Kenneth Hagin, *The Word of Faith* (January 1972); quoted in Frances MacNutt, *Healing* (New York: Bantam, 1976) 103-4.

[21]Michael Norman, "Court orders girl's treatment," *Columbus Dispatch* 1 June 1982.

[22]Watch Tower Bible and Tract Society, *How Can Blood Save Your Life?* (Brooklyn: WBTS, 1990): 5.

[23]*Ibid.* 24-5.

[24]Christian Science Board of Directors, "Facts about Christian Science" (Boston: Christian Science Publishing Society, 1959): 9.

[25]Defendants Deters' and Dupuis' Joint Motion for Judgment on the Pleadings, and Memorandum in Support Thereof in CHILD and *Brown v. Deters* et al., case #C-1-94-0556 in U.S. Dist. Court, Southern District of Ohio, Western Division: 21-22.

[26]"Diphtheria suspected in death of Christian Science child," *CHILD Newsletter* 1994 #1: 10; "Diphtheria confirmed in CS child's death," *CHILD Newsletter* 1994 #3:21.

[27]See for example Defendant's Petition for Prohibition, Exhibit VIII, in *Walker v. Superior Court of Sacramento County*, #SF24996, 15 Nov. 1984; Defendants' Memorandum in Support of Defendants' Motion for Bill of Particulars in *Commonwealth of Massachusetts v. Twitchell*, Suffolk County Superior Court, #069757, July 1988, and Defendants' Motion to Dismiss in *Twitchell*, June 1988.

[28]"Deaths might be linked to church doctrine," *Sioux City Journal* 22 Nov. 1982: 1.

[29]Craig Spence et al., "The Faith Assembly: a study of perinatal and maternal mortality," *Indiana Medicine* March 1984: 180-83.

[30]Craig Spence and T. S. Danielson, "The Faith Assembly: a follow-up study of faith healing and mortality," *Indiana Medicine* March 1987: 238-40.

[31]*Ibid.* 238.

[32]The Bible, Matthew 12:2 1.

[33]John Clark, "Judge orders operation for 3-month-old," *The Cincinnati Enquirer* June 1987.

[34]*Loc cit.*

[35]"Letters to the press," *The Christian Science Sentinel* 3 Dec. 1979: 2128; Bryan Wilson, *Sects and Society: a Sociological Study of the Elim Tabernacle, Christian Science, and Christadelphians* (Berkeley: Univ. of Calif. Press., 1961) 197.

[36]In Missouri, for example, the church explicitly tells its faith healers not to report sick children deprived of medical care to Protective Services, stating as follows: "Section 211.031 simply means that treatment for a child, when other than medical or surgical, is not considered neglect when that treatment is recognized under state law. In Missouri, state laws do recognize Christian Science treatment. Therefore, providing Christian Science treatment for a child may not be considered as neglect." *Legal Rights Missouri* (Kansas City: CSCOP for Missouri, 1984): 16. See also note 17 *supra.*

[37]Christian Science Board of Directors. Letter to teachers, practitioners, and nurses 24 Jan. 1980.

[38]The church frequently quotes Mary Baker Eddy's statement that Christian Scientists should be "the most systematic and law-abiding people on earth." *Legal Rights Ohio* 5.

[39]*Legal Rights Massachusetts* (Boston: CSCOP for Massachusetts, 1983): 17.

[40]Justice Lawrence Shubow's Report on Inquest Relating to the Death of Robyn Twitchell, Dist. Court Dept., West Roxbury Div., Massachusetts, inquest #1 of 1986: 17, 27.

[41]Rita Swan, "Christian Science parents convicted of manslaughter in Boston," *CHILD Newsletter* 1990 #3: 1-25.

[42]*Legal Rights Ohio:* 23-24.

[43]*Ibid.* 12.

[44]First Church of Christ, Scientist. Brief of Amicus Curiae. In *State v. Miskimens,* Coshocton County Court of Common Pleas case # 83 CR-120.

[45]Associated Press, "Baby taken from parents who refuse to care for her," *Dayton Daily News* 23 July 1983: 7.

[46]*Loc cit.*

[47]"Boy, 6, to lose leg under court order," *Cleveland Plain Dealer* 26 March 1977: A10.

[48]Julian Griffin, "Judge Avellone calls decision difficult," *Cleveland Press* 4 April 1977: D3.

[49]*Loc cit.*; "Boy's leg amputated because of cancer," *Cleveland Plain Dealer* 29 March 1977: AT

[50]"Church says help wanted for boy," *Cleveland Press* 26 March 1977: A7

[51]45 *Federal Register* 19 Dec. 1974: 43936.

[52]"Child abuse and neglect prevention and treatment program, final rule," 48 *Federal Register* 26 Jan. 1983: 3698-3704.

[53]Dorcas Hardy, Letter to Congressman Berkley Bedell 18 July 1983.

[54]Rita Swan, Letters to David Girard 28 Feb. 1984 and 24 April 1984.

[55]Rita Swan, Letters to Jay Olson 3 June 1984 and 11 July 1984.

[56]Congressman Berkley Bedell, Letter to Dorcas Hardy 14 June 1984.

[57]Paul Jones, Letter to Rita Swan 15 January 1985.

[58]Robert Moman, Letter to Patricia Barry 20 May 1987.

[59]Swan wrote letters during this period to Lee Fisher and Betty Montgomery, who later became Attorneys-General of Ohio, urging their support for repeal of Ohio's religious exemption laws.

TRUMBULL COUNTY CORONER
CASE REPORT SHEET

NAME OF DECEASED — RONALD ROMAN

ADDRESS 249 HIGH POINT CIRCLE TRUMBULL, OHIO

AGE 11 (10 30 67) MARRIED ____ SINGLE ✓ WIDOWED ____ DIVORCED ____

COLOR WHITE OCCUPATION STUDENT

DATE OF ACCIDENT 10-23-78 HOUR OF DAY 9:50 (A.M.) P.M.

DATE OF DEATH 10-23-78 HOUR OF DAY 11:00 (A.M.) P.M.

PLACE OF DEATH 165 DOUGLAS AVENUE (GRANDPARENT'S HOME)

LOCATION OF BODY THE MORGUE

INFORMATION LEADING TO DEATH 10-17-78 EVENING - CHILD NOT FEELING WELL.
10-18-78 CLD ABDOMINAL PAIN - FREQUENCY OF URINATION.
THEN EVENING THRU 10-20-78 WENT ON TRIP TO COLUMBUS
WITH GRANDPARENTS 10-21-78 RETURNED HOME APPEARED "EXHAUSTED"
AGREED TO COME TO GRANDPARENT'S HOME FOR A FEW DAYS

MARKS NONE

AUTOPSY (YES) NO

CAUSE OF DEATH Gastro-enteritis - dehydration and ? vomiting

RELEASED TO FUNERAL DIRECTOR Mc FARLAND

HAIR BLOND EYES BLUE HEIGHT 5'0" WEIGHT 90 # BEARD NO

TEETH YES MUSTACHE NO COMPLEXION PALE

CASE REPORTED BY JANE Mc FARLAND VIA AMB. SER

DATE OF REPORTING 10-23-78 TIME 9:50 AM

PERSON TAKING CALL Donna Nagy

CASE NUMBER 78-0-1 Abdul Bilal

FATHER - RONALD T-SHIRT, SWEAT PANTS & SHOES

BEST AVAIL

"NOT BEAT UP" 10-23-99 EVENING. VOMITED (HARD UNCHEWED SUBSTANCE)
THEN SEEMED "BETTER" 10-24-99 EARLY AM. BECAME LISTLESS
THEN UNRESPONSIVE.

NO FAMILY HISTORY OF MEDICAL PROBLEMS - HAD NEVER SEEN AN M.D. WAS A CHRISTIAN SCIENTIST. WAS AN OUTSTANDING ATHLETE AND EXCELLENT STUDENT.

(10-19 AND 10-19 ATE PIZZA WITH MUSHROOMS WHICH "DIDN'T TASTE GOOD")

AILABLE COPY

RIGHTS OF MINORS AND COLLEGE STUDENTS

Parental Authority

Under Ohio law, parents have the right to custody of their children, and they can be deprived of this custody only by court order, except that the Juvenile Court Act provides that a law enforcement officer may, without a warrant, take into temporary custody a minor whom the officer with reasonable cause believes to be delinquent, neglected or dependent. While parents generally are accorded the right to select the type of treatment or care to be rendered for their children when they are ill, nevertheless it should also be recognized that care of children is given very special importance under the Juvenile Court Act. One of the definitions of a "neglected minor" under such Act refers to a minor under 18 years of age who is neglected "as to medical or other remedial care recognized under State law."

"A neglected child" includes any child:

(A) Who is abandoned by his parents, guardian, or custodian;

(B) Who lacks proper parental care because of the faults or habits of his parents, guardian, or custodian;

(C) Whose parents, guardian, or custodian neglects or refuses to provide him with proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals, or well being;

(D) Whose parents, guardian, or custodian neglects or refuses to provide the special care made necessary by his mental condition;

A child who, in lieu of medical or surgical care or treatment for a wound, injury, disability, or physical or mental

condition, is under spiritual treatment through prayer in accordance with the tenets and practices of a well-recognized religion, is not a neglected child for this reason alone. Sec. 2151.03.

Thus, if a child is being given Christian Science treatment for an illness, inquiries made by school or other public officials as to care of the child should be answered with assurance that such child is being given good care and is having treatment for the illness. Otherwise, such officials may conclude that the child is not receiving either medical care or *"other remedial care"* and therefore is a "neglected child." In talking with such officials, a parent should stay clear of statements such as "belief of illness" or "claim of sickness" which may result in the officials thinking that the illness is being ignored or treated as a fanciful aberration of some kind. Officials must feel the assurance that Christian Scientists love their children and give them effective treatment and responsible nursing care when the nature of the illness indicates the wisdom of having such nursing care.

Temporary Care; Emergency Medical Treatment; Reimbursement

"Pending hearing of a complaint filed under section 2151.27 of the Revised Code and service of citations, the juvenile court may make such temporary disposition of any child as it deems best. Upon the certificate of one or more reputable practicing physicians, the court may summarily provide for emergency medical and surgical treatment which appears to be immediately necessary for any child concerning whom a complaint or an application for care has been filed, pending the service of a citation upon its parents, guardian or custodian. The court may order the parents, guardian, or custodian, if found able to do so, to reimburse the court for the expense involved in providing such emergency medical and

surgical treatment, and any such person who disobeys such order may be adjudged in contempt of court and punished accordingly." Sec. 2151.33

General Immunization Requirements for Children-Exemption

The Department of Public Health usually sends a form to parents of infants asking if immunizations have been given such infants and indicating that such immunizations are required. No reply is necessary as immunizations are not required by law.

Requirements Relating to Newly-Born Infants

See provisions under heading, "Marriages, Births, and Deaths," on pages 33, 34 and 35 of this booklet.

Physical Examination and Immunization Requirements for Pupils Exemption

The Ohio School Code requires physical examinations and immunizations of pupils in public schools (kindergarten, elementary and secondary). However, the Code also provides an exemption from such examinations and immunizations for any pupil who submits a written objection thereto on constitutional grounds. The exemption provision states:

(1) (Part of a law requiring immunization of school children against poliomyelitis, rubeola, diphtheria, rubella (German Measles), pertussis, and tetanus.) "No pupil shall be admitted . . . to an elementary or high school ... unless such pupil has presented written evidence, satisfactory to the person in charge of admission, that he has received, or is in the process of receiving, immunization against poliomyelitis.

rubeola, diphtheria, rubella (German measles), pertussis, and tetanus ... unless such pupil has presented a written statement of his parent or guardian objecting to the immunization of such pupil . . ." Sec. 3313.671 (A)

a. (Part of a law relating to smallpox) Shall not be required to be immunized against if the Health Commissioner or General Health District determines immunization is no longer medically required. (The school board has final authority to require immunization of school children.)

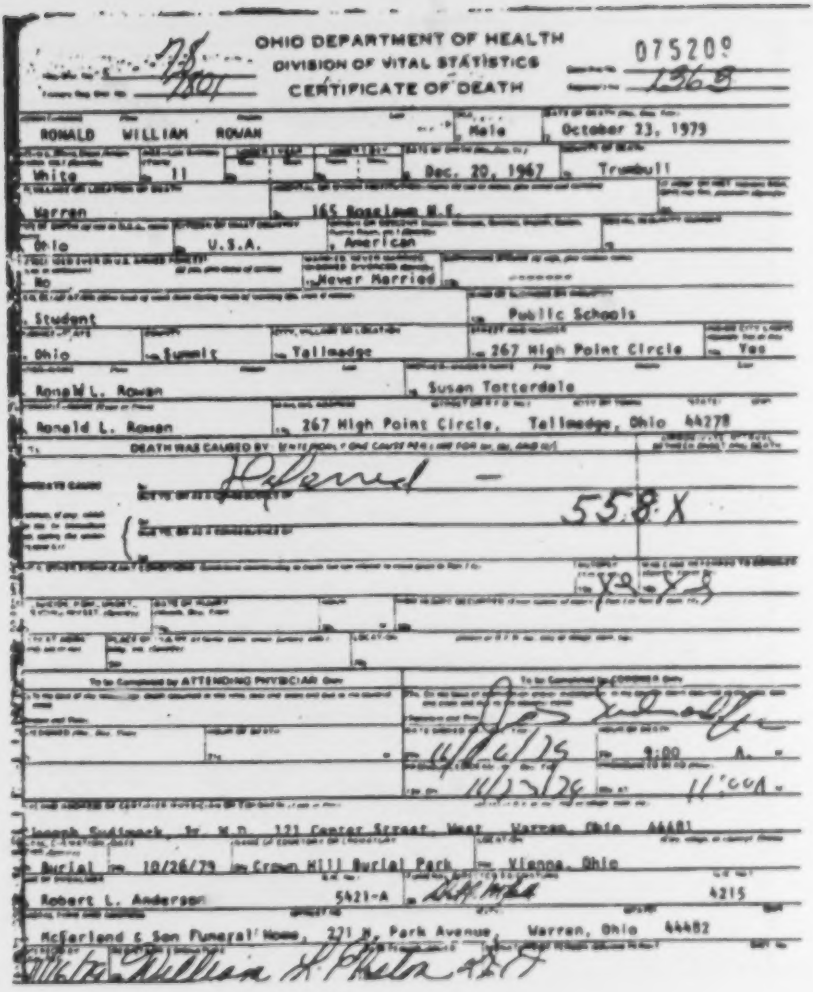
(2) (Part of a law relating to physical examination in public schools.) "This section does not require any school child to receive a medical examination or receive medical treatment whose parent or guardian objects thereto." Sec. 3313.73

(3) (Part of a law authorizing health boards to provide for medical supervision of school children.) "In the medical supervision of school children as provided in this section, no medical or surgical treatments, shall be administered to any minor school child except upon the written request of the parent or guardian of such child. Any information regarding any diseased condition or defect found as a result of any school medical examination shall be communicated only to the parent or guardian of such child and if in writing shall be in a sealed envelope addressed to such parent or guardian." Sec. 3709.22

(4) (Part of a law relating to the appointment by boards of education of physicians, dentists, and nurses.) ". . . The school dentists shall make such examinations and

diagnoses and render such remedial or corrective treatment for the school children as may be prescribed by the board of education; provided that all such remedial or corrective treatment shall be limited to the children whose parents cannot otherwise provide for same, and then only with the written consent of the parents or guardians of such children." Sec. 3313.68

(5) "Boards of education shall require annual examinations by tuberculin test of all school enterers in kindergarten or grade one and of all pupils at a selected grade among grades seven, eight, nine, or ten, and of all transfer pupils from another school whose tuberculin test results are not known. Boards



OHIO DEPARTMENT OF HEALTH
DIVISION OF VITAL STATISTICS
CERTIFICATE OF DEATH

78 1807

07520

1363

RONALD WILLIAM ROWAN | Male | October 23, 1979
White | 11 | Dec. 20, 1967 | Trumbull
Warren | 165 Roselawn N.E.
Ohio | U.S.A. | American
No | Never Married
Student | Public Schools
Ohio | Summit | Tallmadge | 267 High Point Circle | Yes
Ronald L. Rowan | Susan Tattersdale
Ronald L. Rowan | 267 High Point Circle, Tallmadge, Ohio 44278

DEATH WAS CAUSED BY

Deferred — 558.X

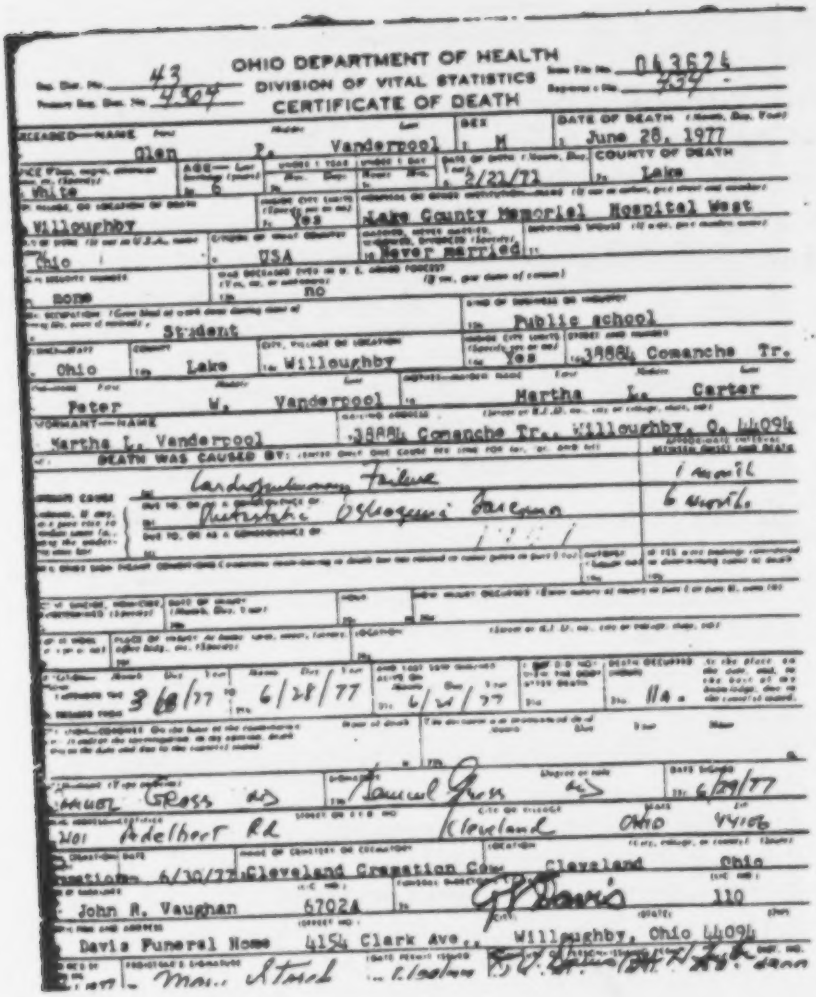
Joseph Sudimack, Jr. M.D. 121 Center Street, West Warren, Ohio 44481

Burial | 10/26/79 | Crown Hill Burial Park | Vienna, Ohio

Robert L. Anderson | 5421-A | 4215

McFarland & Son Funeral Home, 271 N. Park Avenue, Warren, Ohio 44482

BEST AVAILABLE COPY



OHIO DEPARTMENT OF HEALTH
DIVISION OF VITAL STATISTICS
CERTIFICATE OF DEATH

Reg. Dist. No. 43 — Primary Reg. Dist. No. 4307 — State File No. 043674 — Reported No. 534

DECEASED—NAME: Glen P. Vanderpool — SEX: 1 M — DATE OF DEATH: 1 June 28, 1977

RACE: White — AGE: 6 — DATE OF BIRTH: 3/21/71 — COUNTY OF DEATH: Lake

PLACE OF DEATH: Willoughby — Yes — Lake County Memorial Hospital West

BIRTHPLACE: Ohio — USA — Never Married

SOCIAL SECURITY NUMBER: 2078 — MILITARY: NO

OCCUPATION: Student — KIND OF BUSINESS OR INDUSTRY: Public school

RESIDENCE: Ohio — Lake — Willoughby — Yes — 3988½ Comanche Tr.

FATHER—NAME: Peter W. Vanderpool — MOTHER—NAME: Martha L. Carter

INFORMANT—NAME: Martha L. Vanderpool — 3988½ Comanche Tr., Willoughby, O. 44094

DEATH WAS CAUSED BY: Cardiopulmonary Failure — 1 month

Due to, or as a consequence of: Pulmonic Dysplasia Secondary — 6 months

Due to, or as a consequence of:

Other significant conditions contributing to death but not related to cause given in Part I:

Autopsy: No — Was case referred to coroner: No

Accident — Suicide — Homicide — Date of injury: 3/8/77 — Hour: — Injury at work: No — Date of death: 6/28/77 — Hour: — Time between injury and death: 6/21/77 — Hours: 114 m.

How did injury occur? (Enter nature of injury in Part I or Part II, state NO)

Where did injury occur? (Specify such places as factory, street, office building, etc.)

Injury occurred: In or about home — On farm — In industry — In public building — In motor vehicle not in traffic — In traffic — In sports activity — While in military service — While engaged in other specified activity — While in other specified place — While in unspecified place

CERTIFIER: Gross MD — Samuel Gross MD — Date Signed: 6/29/77

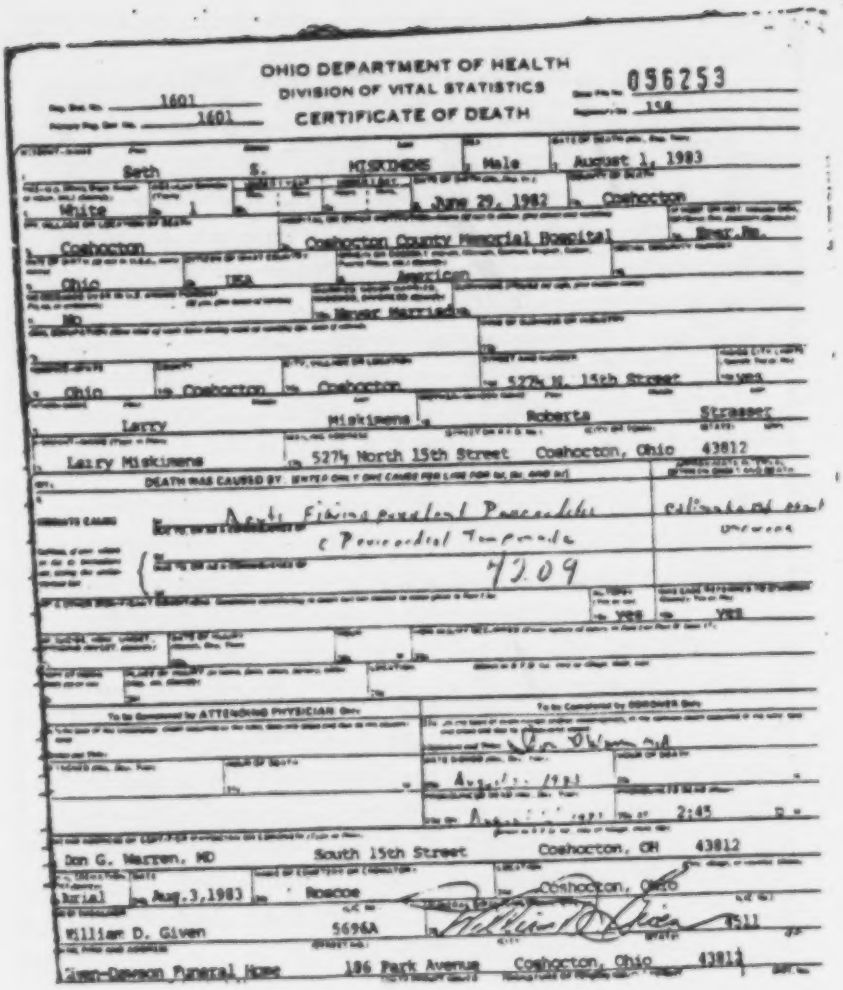
Address: 901 Adelbert Rd — Cleveland — OHIO — 44106

Cremation: 6/30/77 — Cleveland Cremation Corp. — Cleveland — Ohio

Funeral Director: John R. Vaughan — 6702A — 110

Davis Funeral Home — 4154 Clark Ave., Willoughby, Ohio 44094

Mail Stock



OHIO DEPARTMENT OF HEALTH
DIVISION OF VITAL STATISTICS
CERTIFICATE OF DEATH

1601
1601

056253
158

Seth S. MISKIMENS | Male | August 1, 1983
White | June 29, 1982 | Coshocton
Coshocton | Coshocton County Memorial Hospital | Bear Rd.
Ohio | USA | American
No | Never Married
Ohio | Coshocton | Coshocton | 527½ N. 15th Street | yes
Larry Miskimens | Miskimens | Roberta | Strasser
Larry Miskimens | 527½ North 15th Street | Coshocton, Ohio | 43812

DEATH WAS CAUSED BY: (ENTER ONLY ONE CAUSE PER LINE FOR (a), (b), AND (c).)

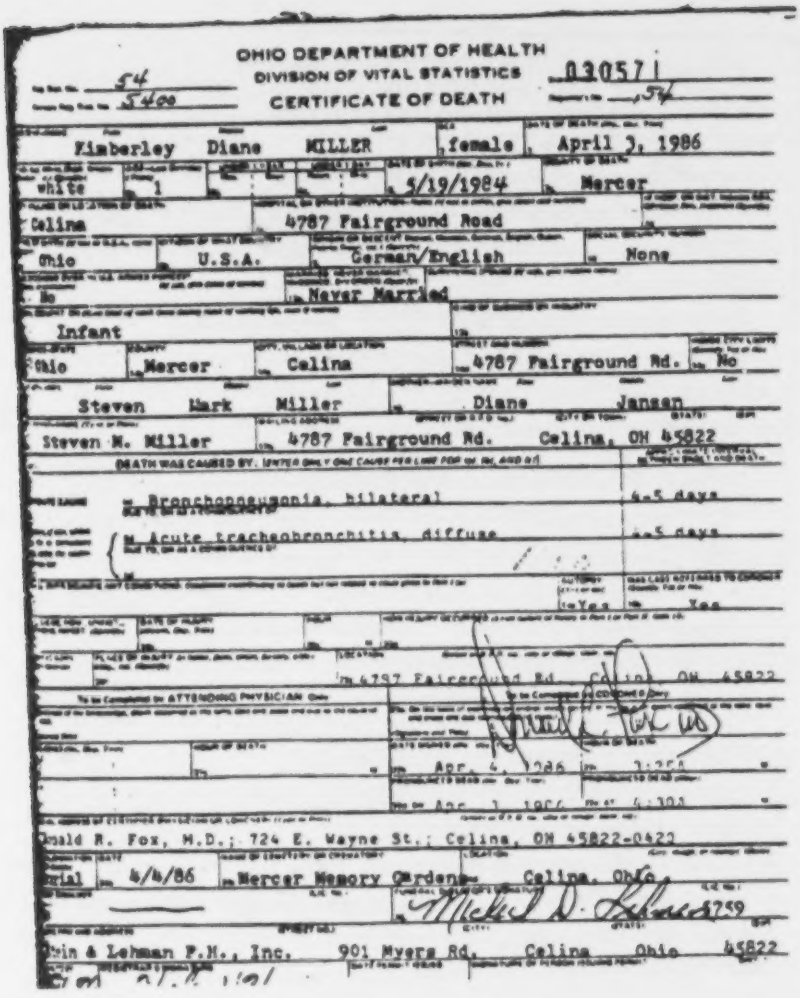
a. Acute Fibrinopurulent Pericarditis | estimated
b. Pericardial Tamponade
c. 42.09
yes | yes

To be Completed by ATTENDING PHYSICIAN Only

To be Completed by CORONER Only

August, 1983 | at 2:45 P.M.

Don G. Warren, MD | South 15th Street | Coshocton, OH | 43812
Burial | Aug.3,1983 | Rosece | Coshocton, Ohio
William D. Given | 5696A | 4511
Given-Dawson Funeral Home | 186 Park Avenue | Coshocton, Ohio | 43812



OHIO DEPARTMENT OF HEALTH
DIVISION OF VITAL STATISTICS
CERTIFICATE OF DEATH

54
5400

030571

54

Kimberley Diane MILLER | female | April 3, 1986
white | 1 | 5/19/1984 | Mercer
Celina | 4787 Fairground Road
Ohio | U.S.A. | German/English | None
No | Never Married
Infant
Ohio | Mercer | Celina | 4787 Fairground Rd. | No
Steven Mark Miller | Diane Jansen
Steven M. Miller | 4787 Fairground Rd. Celina, OH 45822

DEATH WAS CAUSED BY: (ENTER ONLY ONE CAUSE PER LINE FOR (a), (b), AND (c).)

(a) Bronchopneumonia, bilateral — 4-5 days
(b) Acute tracheobronchitis, diffuse — 4-5 days

Yes | Yes

4797 Fairground Rd. Celina, OH 45822

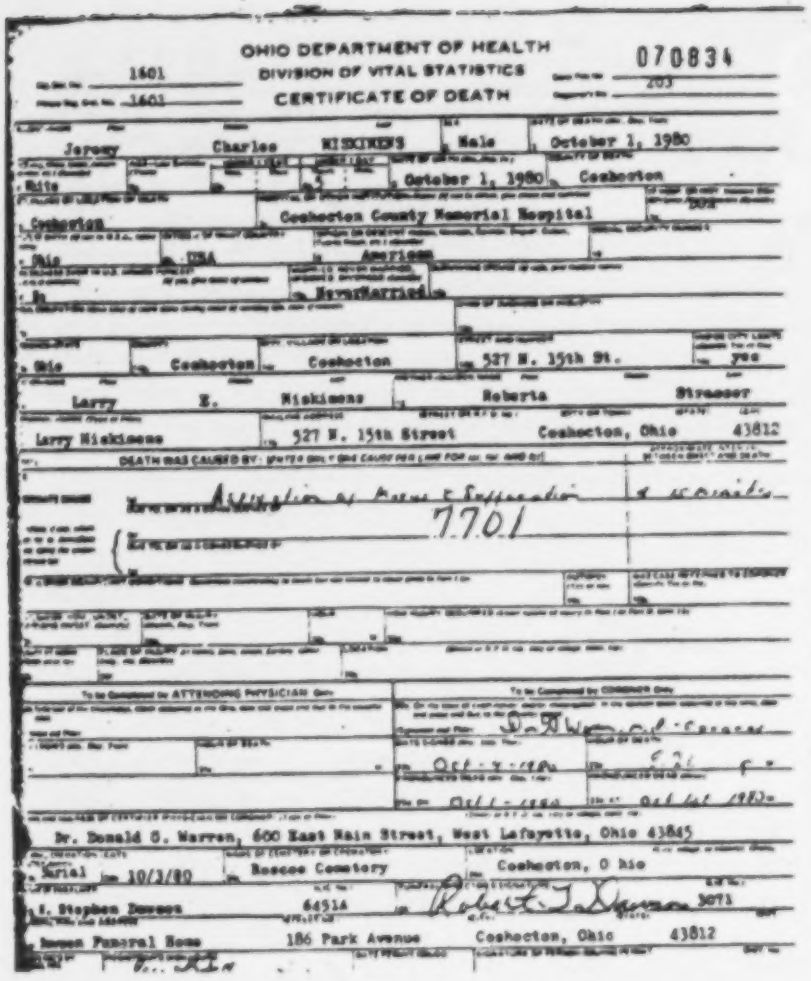
Apr. 4, 1986 | 7:25A
Apr. 3, 1986 | 4:30P

Donald R. Fox, M.D.; 724 E. Wayne St.; Celina, OH 45822-0422

Burial | 4/6/86 | Mercer Memory Gardens | Celina, Ohio

Michael D. Lehman 3759

Irwin & Lehman F.H., Inc. | 901 Myers Rd. | Celina | Ohio | 45822



OHIO DEPARTMENT OF HEALTH
DIVISION OF VITAL STATISTICS
CERTIFICATE OF DEATH

1601 — 1601 — 070834 — 203

Jeremy — Charles — NISKIMENS — Male — October 1, 1980

White — October 1, 1980 — Coshocton

Coshocton — Coshocton County Memorial Hospital

Ohio — USA — American

Never married

Ohio — Coshocton — Coshocton — 527 N. 15th St. — Yes

Larry — E. — Niskimens — Roberta — Strasser

Larry Niskimens — 527 N. 15th Street — Coshocton, Ohio — 43812

DEATH WAS CAUSED BY: Asphyxiation by Manual Suffocation — 7701

To be Completed by ATTENDING PHYSICIAN

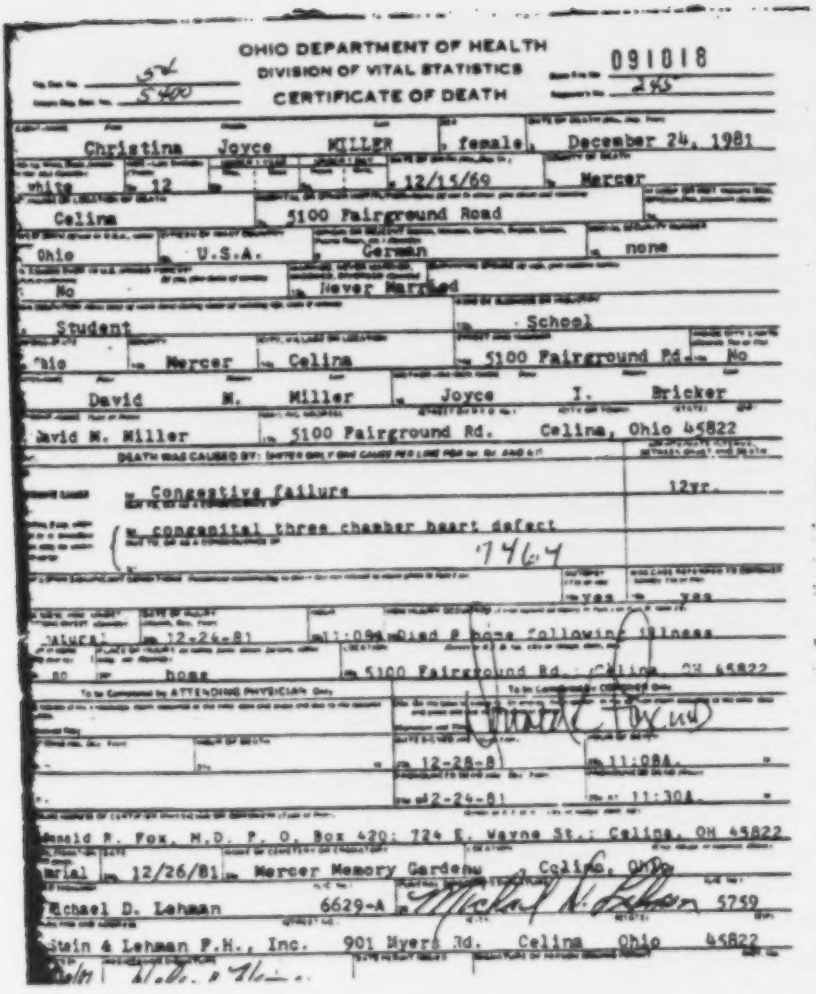
To be Completed by CORONER

Dr. Donald G. Warren, 600 East Main Street, West Lafayette, Ohio 43845

Burial — 10/3/80 — Rescoe Cemetery — Coshocton, Ohio

E. Stephen Dawson — 64514 — Robert E. Dawson — 3071

Dawson Funeral Home — 186 Park Avenue — Coshocton, Ohio — 43812



OHIO DEPARTMENT OF HEALTH
DIVISION OF VITAL STATISTICS
CERTIFICATE OF DEATH

091018

Christina Joyce MILLER female December 24, 1981
white 12 12/15/69 Mercer
Celina 5100 Fairground Road
Ohio U.S.A. German none
No Never Married
Student School
Ohio Mercer Celina 5100 Fairground Rd. No
David M. Miller Joyce I. Bricker
David M. Miller 5100 Fairground Rd. Celina, Ohio 45822

DEATH WAS CAUSED BY:
Congestive failure 12yr.
congenital three chamber heart defect
7464
yes yes
12-24-81 11:09A Died @ home following illness
home 5100 Fairground Rd. Celina, OH 45822
12-28-81 11:08A.
12-24-81 11:30A.
Donald R. Fox, M.D. P. O. Box 420; 724 E. Wayne St.; Celina, OH 45822
Burial 12/26/81 Mercer Memory Gardens Celina, Ohio
Michael D. Lehman 6629-A Michael D. Lehman 5759
Stein & Lehman F.H., Inc. 901 Myers Rd. Celina Ohio 45822

OHIO DEPARTMENT OF HEALTH
DIVISION OF VITAL STATISTICS
CERTIFICATE OF DEATH

SC 5400 — 053759 — 131

Meredith Adele HINTON | female | July 10, 1984
White | 7 | 23 | 11/15/1983 | Mercer
Celina | 3339 Praha Pike
Ohio | U.S.A. | Norway/Swiss/German | none
No | never married
infant
Ohio | Mercer | Celina | 3339 Praha Pike | No
Kent | Hinton | Dawn | Shafer
Kent Hinton | 3339 Praha Pike | Celina, Ohio 45822

DEATH WAS CAUSED BY: (ENTER ONLY ONE CAUSE PER LINE FOR (a), (b), AND (c).)

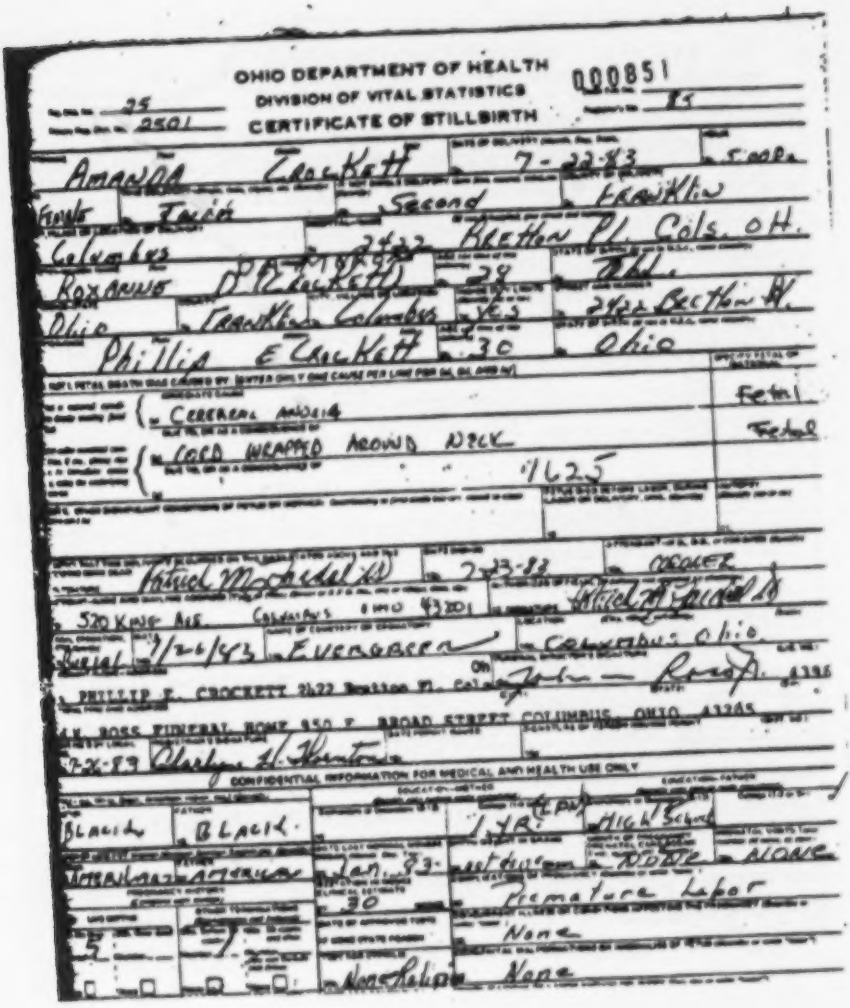
3070
vomiting.
Pneumonia, aspiration, bilateral, secondary to 4-5 da.
Ileo-ileal intussusception 1-2 da.
Hypokalemia secondary to diarrhea and vomiting 4-5 da.

Was not a surgical operation
Was not autopsy
Natural | 7-10-84 | APPEAR'd | Child expired @ home.
Home | 3339 Praha Pike, Celina, OH 45822

7-20-84 | Approx. 7:00A
7-10-84 | 2:20P.

Ronald R. Fox, M.D. 724 E. Wayne St., Celina, OH 45822

Burial | 7/13/84 | North Grove Cemetery | Celina, Ohio
Michael D. Lehman 5759
Stein & Lehman F.H., Inc. 901 Myers Rd. Celina Ohio 45822



OHIO DEPARTMENT OF HEALTH
DIVISION OF VITAL STATISTICS
CERTIFICATE OF STILLBIRTH

000851

AMANDA Lee Keith — 7-22-83 — 5 mos.
Franklin — Second — Franklin
2422 Beetham Pl. Cols. OH.
Columbus — 2422 Beetham Pl. — 28 — Md.
Roxanne D. Pl. Keith — 2422 Beetham Pl.
Ohio — Franklin — Columbus — Yes — 2422 Beetham Pl.
Phillip E. Lee Keith — 30 — Ohio

Fetal
Fetal
CEREBRAL ANOXIA
CORD WRAPPED AROUND NECK
1625

Patrick McArdle MD — 7-23-83 — Crocker
520 King Ave. Columbus Ohio 43201 — Patrick McArdle MD
Burial — 7/26/83 — Evergreen — Columbus Ohio
PHILLIP E. CROCKETT 2422 Beetham Pl. Columbus Ohio — Franklin — Ohio
ROSS FUNERAL HOME 950 E. BROAD STREET COLUMBUS, OHIO 43205
7-26-83 Marlyn A. Hamilton

CONFIDENTIAL INFORMATION FOR MEDICAL AND HEALTH USE ONLY

Black — Black — 4 yrs — High School
American — Jan 83 — 30 — None — Premature Labor
None — None

OHIO DEPARTMENT OF HEALTH

DIVISION OF VITAL STATISTICS

COLUMBUS

SUPPLEMENTARY MEDICAL CERTIFICATION

File no. 1363

Name of deceased RONALD WILLIAM ROWAN

Place of death Warren, Trumbull, Ohio Date of death Oct. 21, 1979

12. CAUSE OF DEATH

PART I. DEATH WAS CAUSED BY: IMMEDIATE CAUSE (a) Asphyxiation

Conditions, if any, which gave rise to above cause (a), stating the underlying cause last. (b) As a result of Gastric Carcinoma

(c) Gastric Carcinoma

PART II. Other significant conditions contributing to death but not related to the disease or condition causing it

13. WAS AUTOPSY PERFORMED? YES ☐ NO ☒

14. WAS DEATH DUE TO ACCIDENT ☐ HOMICIDE ☐ SUICIDE ☐

15. IF FEMALE: PREGNANT ☐ WITHIN 3 MONTHS OF DEATH ☐ WITHIN 3 TO 12 MONTHS OF DEATH ☐

16. DATE OF INJURY (Month, Day, Year)

17. PLACE OF INJURY (e.g., in or about home, farm, factory, street, office bldg., etc.)

18. DID INJURY OCCUR IN OCCUPATION, DURING MILITARY SERVICE, WHILE AT SCHOOL?

19. I attended the deceased from [illegible] to [illegible] and last saw [illegible] alive on [illegible]. Death occurred at [illegible] on the date stated above, and to the best of my knowledge, from the cause stated.

SIGNATURE OF THE ATTENDING PHYSICIAN OR CORONER [signature] (MD) DATE SIGNED 1/5/80

SIGNATURE OF LOCAL REGISTRAR Betty Davey, Deputy DATE SIGNED 1/9/80

THIS SUPPLEMENTARY CERTIFICATE IS TO BE COMPLETED BY THE ATTENDING PHYSICIAN OR CORONER AND FILED WITH LOCAL REGISTRAR OF VITAL STATISTICS

OHP 5393.65

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHILDREN'S HEALTH CARE IS A LEGAL DUTY, INCORPORATED, et. al.,	*	C-1-94-556
PLAINTIFFS,	*	
VS.	*	
JOSEPH T. DETERS, et. al.,	*	AFFIDAVIT OF DANIEL MYERS
DEFENDANTS.	*	

* * * * * * * * * * * * * * *

STATE OF OHIO, MERCER COUNTY, ss:

Comes now Daniel Myers, being first duly sworn, on oath deposes and states:

1. That he is an attorney licensed to practice law in the courts of Ohio, having an Ohio Attorney Registration number 0003431. Affiant's address is P.O. Box 230, Celina, Ohio 45822. Affiant is competent, under no legal disability, and he makes this afffdavit on first hand knowledge of the matters hereinafter contained.

2. That from the first Monday in January, 1980, through the first Monday in 1992, affiant was the County Prosecutor for Mercer County, Ohio, charged with the responsibility and having the discretion to initiate, prosecute, and dismiss prosecutions for criminal offenses committed within the geographic boundaries of Mercer County, Ohio.

3. That affiant is aware of the deaths of at least three minor children in Mercer County due to neglect to seek medical treatment by parents, guardians, or persons in loco parentis who practiced spiritual treatment of the child's illness or defect through prayer alone without the assistance of reasonable medical care. As a result thereof, such children died from illnesses or defects which are ordinarily curable by medical treatment.

4. The first of such cases was the death of twelve (12) year old Christina J. Miller, who died in Mercer County on December 24, 1981, of a heart defect. Her parents belonged to a religious group known as Faith Assembly, which teaches that a child's illness or defect may be cured through prayer alone without medical treatment. In the course of investigating her death, I learned that medical treatment was withheld from her by her parents even though her condition was curable by ordinary medical treatment. I further learned that her condition before she died was recognizable as an illness to a reasonably observant parent. Christina's heart defect caused a lack of circulation which made her lips turn blue. She was teased by her playmates who called her "bluelips". Before she died, her fingernails had turned blue from lack of blood circulation.

5. In the case of Christina J. Miller, I reviewed the spiritual treatment exemptions contained in O.R.C.2919.22 and determined that because the parents had a religious belief in treatment of children's illnesses through prayer alone, and had practiced such treatment upon her, that any attempt to prosecute the parents for child endangerment or manslaughter would be futile. As a result, I exercised my discretion not to commence a criminal prosecution for her death. Were it not for the spiritual treatment exemptions contained in the statutes above named in all reasonable likelihood, I would have submitted the case to a grand jury for possible criminal prosecution for her death.

6. The next case I became aware of was the death of eight (8) month old Meredith A. Hinton who died in Mercer County on July 10, 1984, of pneumonia. Her parents also belonged to the Faith Assembly. In the course of investigating her death, I learned that medical treatment was withheld from her by her parents even though her condition was curable by ordinary medical treatment. I further learned that her condition before she died was recognizable as an illness to a reasonably observant parent.

7. In the case of Meredith A. Hinton, I again reviewed the spiritual treatment exemptions contained in O.R.C. 2919.22 and determined that because the parents had a religious belief in treatment of children's illnesses through prayer alone, and had practiced such treatment upon her, that any attempt to prosecute the parents for child endangerment or manslaughter would be futile, which was the same conclusion reached in the case of Christina J. Miller. As a result, I exercised my discretion not to commence a criminal prosecution for her death. Were it not for the spiritual treatment exemptions contained in the statutes above named in all reasonable likelihood I would have submitted the case to a grand jury for possible criminal prosecution for her death.

8. The next case I became aware of was the death of two (2) year old Kimberly D. Miller who died in Mercer County on April 3, 1986, of acute bilateral bronchopneumonia. She was the niece of Christina J. Miller above. Her parents also belonged to the Faith Assembly. In the course of investigating her death, I learned that medical treatment was withheld from her by her parents even though her condition was curable by ordinary medial treatment. I further learned that her condition before she died was recognizable as an illness to a reasonably observant parent. The circumstances surrounding her death are described in State v. Miller, slip op. no. 86-CRM-30.

9. After the time of Kimberly D. Miller's death, I became aware of the Coshocton County Common Pleas Court decision in State v. Miskimens, reported in 490 N.E.2d931 (Ohio Com.Pl. 1984). I decided that it was my duty to bring a prosecution for her death in spite of the spiritual treatment exemptions to deter further incidents of child endangerment in Mercer County. As a result, I exercised my discretion and commenced a criminal prosecution for her death. The Mercer County Grand Jury returned an indictment against her parents on August 15, 1986. The case went to trial and the decision in that case held that the exemptions are unconstitutional but charges against the parents of Kimberly D. Miller on child endangerment were dismissed because of the exemptions.

10. Since the decision in State v. Miller, supra, there have been no instances of deaths of minor children in Mercer County due to withheld medical treatment in sects which believe in treatment through prayer alone. I have been advised that the parents in such sects now obtain medical care for their children and in my opinion, that is due to the court's decision that the exemptions are unconstitutional in State v. Miller.

11. I have been a proponent of the repeal of the spiritual treatment exemptions above described and I have testified in subcommittee of the General Assembly in favor of such repeal. Thus far, all efforts at such repeal have been unsuccessful. It as my view, based upon my experience in Mercer County and my observation of the change in behavior of religious sects which practice spiritual treatment through prayer alone, that a decision of this court finding the exemptions unconstitutional would have a significant effect upon the future behavior of parents in such sects resulting in the saving of many children who would otherwise die from lack of reasonable medical care.

Further Affiant sayth not.

s/s _____
Daniel Myers

Subscribed and sworn to before me this 10th day of April, 1995.

s/Angela Post _____
Notary Public

wp:a:child.da

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
C-1-94-556

CHILDREN'S HEALTHCARE
IS A LEGAL DUTY,
INCORPORATED, et at.,

Plaintiffs,

vs.

AFFIDAVIT
STEVEN M. BROWN

Joseph T. Deters, et al.,

Defendants.

Comes now Steven M. Brown, being first duly sworn, on oath deposes and states:

1. That I am one of the plaintiffs in this action, and I make this affidavit based upon first hand knowledge of the matters hereinafter contained, and in opposition to Defendants' motion to dismiss this action.

2. That I have read the Second Amended Complaint herein and the same is true and correct of my own knowledge.

3. That I am an individual residing in Nashua, New Hampshire. I have commenced this action on my own behalf, and on behalf of my only two children, Eve Brown, now age 13, and Hilary Brown, age 10.

4. Both of my children reside in Hamilton County, Ohio, in the primary physical custody of their mother, Kim Strubbe, who practices a religion commonly known as Christian Science. Christian Science is a religion founded by Mary

Baker Eddy which promotes the treatment of illnesses by spiritual means through prayer alone.

5. Kim Strubbe, formerly known as Kim Brown, and I were divorced on October 27, 1987 by a Decree of Divorce issued by the Hillsborough County District Court, in the State of New Hampshire.

6. Under the terms of the Decree of Divorce, Kim Strubbe and I were awarded joint custody of our minor children, plaintiffs Eve Brown and Hilary Brown. Primary physical custody was awarded to Kim Strubbe, subject to reasonable periods of physical custody to me. That after the divorce, while the children resided with Kim Strubbe in the State of New Hampshire, I visited with them weekly, and I was able to frequently observe the state of their health in order to protect them from endangerment and neglect by Kim Strubbe.

7. That subsequent to the Decree of Divorce, Kim Strubbe moved to the State of Ohio, County of Hamilton, and now resides there with the plaintiff minor children. As a result of the move to Ohio, my contact with the children became severely limited and I became unable to frequently observe them to determine the state of their health in order to protect them from neglect.

8. That from time to time, as ordered in the Decree of Divorce, I have had, and I intend to have in the future, the physical custody of my children both in the State of Ohio and elsewhere. Such physical custody renders me responsible to provide medical care, protection, and support to the minor children. Under the terms of the divorce decree and the law of the State of Ohio, Kim Strubbe is required to provide care and support to the children while they are in her physical custody.

9. That I have no religious belief in the spiritual treatment of children's illnesses through prayer alone, nor do I adhere to the tenets of any religion, organized or unorganized, recognized or unrecognized, which believes in the treatment of

children's illnesses or defects by spiritual means through prayer alone.

10. That one of the tenets of the religion known as Christian Science, to which Kim Strubbe adheres, is the belief in the treatment of all illnesses, including children's illnesses, by spiritual means through prayer alone, and to the exclusion of medical care.

11. That prior to my divorce, Kim Strubbe practiced Christian Science spiritual treatment through prayer alone for illnesses of the children, to the exclusion of medical care and medical diagnosis. Christian Science teaches that a medical diagnosis actually causes the disease being diagnosed. I believe that Christian Science spiritual treatment is being used on my children in place of medical care, and I fear that it will be so used in the future to their detriment.

12. That upon the moving of Kim Strubbe from the State of New Hampshire to the State of Ohio, I hired and paid counsel, to seek an amendment to the divorce decree in the courts of the State of New Hampshire to obtain medical safeguards for my children, requiring periodic medical checkups by a physician and requiring Kim Strubbe to report to me any illnesses of the children. The New Hampshire decree was then domesticated in Ohio.

13. When it became apparent to me that Kim Strubbe failed to comply with the court ordered medical safeguards described above, I sought and obtained a court order in Ohio which imposed additional duties upon Kim Strubbe in the form of additional medical safeguards for the protection of my children, and notice to me whenever a Christian Science practitioner is hired for the children.

14. The presence of the spiritual treatment exemptions in the statutes of both New Hampshire and Ohio has caused me great concern because they are relied upon by Christian Scientists as proof that their religious healing methods are "legal." They are the reason I have had to undertake

extraordinary measures in my divorce proceedings to protect my children as described above. As a result of these extraordinary measures, I have had to incur a great deal of extra expense in attorney's fees for the post decree court proceedings in both New Hampshire and Ohio courts.

15. It is my belief that the lives and good health of the plaintiff minor children are threatened by the preference given by the State of Ohio in O.R.C. Secs. 2919.22(A) and 2151.03(B) to spiritual treatment of children through prayer alone, and the exemption from criminal liability provided to those who practice it on my children. The minor child Eve, has a congenital kidney problem which requires periodic medical check-ups and observation, which Kim Strubbe has knowingly failed to provide. Currently she resists providing it despite all of the court ordered safeguards. Immunization of the plaintiff minor children from common childhood diseases has also been neglected by Kim Strubbe. In spite of the fact that the children are primarily in her physical custody, I have been the one who had had to see to it that the children are immunized from common childhood diseases such as DPT, tetanus, etc.

16. It is my belief that Kim Strubbe has not complied with the terms of the post decree orders above described by failing to report the children's illnesses to me. Kim Strubbe and her new husband, William Strubbe, have failed and refused to offer explanations for the children's' recent school absences. On October 26, 1994, during a routine phone call with Hilary, she informed me that she had been out of school for the past three days. When I asked to talk to Kim, Hilary told me she wasn't there. When I asked to talk to Bill, Kim's husband, the phone went dead. I called back and spoke to Bill who told me that Kim was there but was ill and couldn't talk to me. I told Bill that I wanted the children seen by a doctor tomorrow. He laughed and said he didn't know how he could do that. I have learned from the doctor's office that Hilary was brought in on

October 27, 1994 and diagnosed with a sinus infection, The children's reportcard indicate that they have been absent from school at various times, yet Kim has never reported any of the children's illnesses to me. I have always learned about them much later from the children.

17. It is abhorrent to me that the State of Ohio has given specific recognition and endorsement to the religious practice of treating illness of children through prayer alone. The existence of the exemptions in the laws of Ohio appears to me to elevate and exalt the practice of spiritual treatment over my own belief in medicine and my belief that medical care is the best form of care for my children. It is abhorrent to me that the State of Ohio allows one group of parents to withhold lifesaving medical care from children because they subscribe to certain religious beliefs. The above exemption statutes make one class of children second-class citizens without the rights to medical care enjoyed by other children. These laws deprive that class of children of their right to life without due process. My children have done nothing to deserve the second class status that these exemptions foist upon them. These laws are a gross violation of the fairness and respect for the individual inherent in our form of government and an abrogation of the State's duty to protect children.

18. That I am offended that the State of Ohio has passed a law giving recognition and endorsement to spiritual treatment of children's illnesses in accordance with the tenets of a recognized religious body. I feel that such a law which incorporates this religious practice into the Ohio criminal statutes and which insulates believers in this religious practice from the reach of criminal prosecution is an endorsement by the state of a religious ritual that causes injuries and deaths of children and endangers my children's' lives by encouraging such treatment.

18. In addition, the state's recognition of and incorporation of spiritual treatment into its laws indicates to

me that certain religious sects have found special favor in the legislature of Ohio, and as a result they have achieved a special status that non-believers, such as I, do not have. It is inappropriate for the State of Ohio to give special favoritism toward some who have a particular religious belief which I do not share, as these exemptions have done.

19. While I was married to Kim Strubbe I came to understand certain Christian Science beliefs. Christian Scientists believe in the strict adherence to the law under the biblical admonition to "render unto Caesar what is Caesar's." Therefore, they view the spiritual treatment provisions as explicit recognition by the state law of the effectiveness of spiritual treatment. There is no doubt in my mind that if the provisions were ruled illegal or repealed, that Kim Strubbe and other Christian Science parents would obey and provide medical care to children.

s/s _____
Steven M. Brown

Subscribed and solemnly affirmed under
penalty of perjury this 21st day of
April, 1995.

s/Robert H. Durant _____
Notary Public

Supreme Court, U.S.
FILED
JAN 23 1997
CLERK

No. 96-991

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

CHILDREN'S HEALTHCARE IS A LEGAL DUTY,
et al.,
Petitioners,

v.

BETTY D. MONTGOMERY,
Attorney General of Ohio,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BETTY D. MONTGOMERY
OHIO ATTORNEY GENERAL

JEFFREY S. SUTTON
State Solicitor
SUSAN E. ASHBROOK
Counsel of Record
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the *Ex Parte Young* exception to the Eleventh Amendment allows the Ohio Attorney General to be sued, not because of any allegedly illegal action or inaction on her part, but solely because of her official position.

2. Whether Petitioners have standing when they have suffered no injury in fact, and any injury they may suffer is not caused by the conduct of Respondent and would not be redressed by a favorable opinion.

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STATEMENT OF THE CASE

Notwithstanding Petitioners' lengthy discussion of the merits of the case, the only issue before this Court is a jurisdictional one. Petitioners have brought this suit against the Attorney General of Ohio, not because of any past, current or threatened unconstitutional conduct on her part, but merely as a way to bind the State of Ohio. The Sixth Circuit correctly held that the Eleventh Amendment prevents a federal court from proceeding on this basis, and that the exception carved out in the Eleventh Amendment by *Ex Parte Young*, 209 U.S. 123 (1908), is inapplicable.

Petitioners imply that the Sixth Circuit's decision forecloses review of the statutes they challenge. This is incorrect for two reasons. First, Petitioners may seek review in State court, which is an adequate venue for their constitutional claims. *See Stone v. Powell*, 428 U.S. 465, 495 n. 35 (1976) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and

to uphold federal law."). Second, Petitioners may seek federal court review by bringing this suit against the local county or city prosecutor. In fact, Petitioners initially did include local prosecutors in their suit. But when those prosecutors were dismissed by the district court, Petitioners did not appeal or cross-appeal that issue. Petitioners cannot use their failure to pursue the appropriate party as evidence that no federal review is available.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE SIXTH CIRCUIT'S ANALYSIS OF *EX PARTE YOUNG* IS IN ACCORD WITH THIS COURT'S DECISIONS.

The Eleventh Amendment prohibits suits against state officials when, as here, they are sued in their official capacity. *Kentucky v. Graham*, 473 U.S. 159, 167 (1985). *Ex Parte Young* provides an exception for suits seeking to prevent a state official from violating or continuing to violate the federal constitution. In the decision below, the Sixth Circuit correctly analyzed *Ex Parte Young* as allowing a federal court to enjoin a state official from *acting* unconstitutionally. The court thus concluded that the *Ex Parte Young* doctrine has no applicability to a case, such as the present one, where there has been no action or threatened action on the part of the state official. This analysis fully accords with the decisions of this Court.

Beginning with *Ex Parte Young* itself, this Court has consistently held that a federal court may enjoin a state actor

from violating or threatening to violate the constitution. Thus,

> individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, *and who threaten and are about to commence proceedings*, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a federal court of equity from such action.

209 U.S. at 155-156 (emphasis added). Adherence to this standard is necessary if the Eleventh Amendment is to have any vitality. Without the requirement that an official be connected to a statute and be acting pursuant to that statute, the Eleventh Amendment would offer no immunity protection to state officials such as the Attorney General. The Attorney General could be sued over her objections every time a plaintiff wanted to challenge the constitutionality of a statute, a result that would be convenient for the plaintiff, but

inconsistent with the Eleventh Amendment.[1]

The Court has been careful to adhere to this distinction in case after case. *See e.g.*, *Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992) (state attorney generals may be enjoined because they "had made it clear that they would seek to enforce the challenged" statute); *Dombrowski v. Pfister*, 380 U.S. 479, 483-484 (1965) (a federal injunction against a state prosecution would be justified where state officers threaten and are about to commence unlawful proceedings); *Terrace v. Thompson*, 263 U.S. 197, 214 (1923) ("Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravene the federal Constitution. . . ."); *Western Union Tel. Co. v. Andrews*, 216 U.S. 165, 166 (1910) (*Ex Parte*

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[1]Petitioners cite numerous statues which allocate certain criminal law enforcement duties to the Attorney General. Attorney General Montgomery agrees that she has many important law enforcement duties. This is not the issue before this Court. The issue before this Court is whether Attorney General Montgomery has acted, is acting or has threatened to act in violation of Petitioners' constitutional rights.

Young is applicable because prosecutors are charged with enforcement and have threatened and are about to commence enforcement of the unconstitutional act).

Petitioners attempt to avoid the conclusion that the decision below is in accord with this Court's precedents in two ways. First, they attempt to distinguish the present case because they seek declaratory as well as injunctive relief, relying on *Steffel v. Thompson*, 415 U.S. 452 (1974) and *Perez v. Ledesma*, 401 U.S. 82, 93 (1971) (Brennan, J., concurring in part and dissenting in part). Contrary to the Petitioners' assertions, these cases do not hold that the Declaratory Judgment Act, 28 U.S.C. § 2201, is a separate exception to the Eleventh Amendment. Indeed, the Eleventh Amendment's "jurisdictional bar applies regardless of the relief sought." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984). Nothing in the Declaratory Judgment Act establishes the requisite unequivocal intent of Congress to abrogate the Eleventh

Amendment, *Seminole Tribe v. Florida*, _____ U.S. ____, 116 S.Ct. 1114, 1123 (1996), even assuming Congress had the power to do so.

Petitioners also attempt to avoid the Sixth Circuit's conclusion that *Ex Parte Young* requires action on the part of the state official by citing numerous cases that have allowed facial challenges to state statutes even where there was no threatened enforcement. *See* Pet. at 16 (citing *e.g. Edwards v. Aguillard*, 482 U.S. 578 (1987); *Roe v. Wade*, 410 U.S. 113 (1973); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923)). None of these cases, however, contain any Eleventh Amendment analysis, let alone any analysis of *Ex Parte Young*.

In the last analysis, Petitioners have failed to assert that the Ohio Attorney General has, through either action or inaction, done anything to violate Petitioners' constitutional rights. Nor have Petitioners alleged that the Attorney General

is threatening to do so. Under these facts, the Eleventh Amendment does not allow a suit to be maintained against the Attorney General without her consent.

II. THERE IS NO MEANINGFUL LOWER COURT CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

The vast majority of lower courts have dismissed suits that were brought against a state Attorney General not because of any actual or threatened conduct, but merely because of his or her office. That, of course, is in accord with the Sixth Circuit's decision below.

For example, the decision below is in accord with the following circuit decisions. *1st Westco Corp. v. School District of Philadelphia*, 6 F.3d 108, 114 (3rd Cir. 1993) (Attorney General dismissed because, *inter alia*, he had not enforced or threatened to enforce the statute); *Sherman v. Community Consolidated School District 21 of Wheelington Township*, 980 F.2d 437 (7th Cir. 1992) (Attorney General must be dismissed from suit attacking constitutionally of

requiring Pledge of Allegiance in schools because "Plaintiffs apparently named the office of the Attorney General in an effort to obtain a judgment binding the State of Illinois as an entity, a step that Congress did not authorize when enacting 42 U.S.C. §1983, and that the Eleventh Amendment does not permit in the absence of such authorization.") *cert. denied*, 113 S.Ct. 2439 (1993); *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (Attorney General dismissed because "[a]bsent a real likelihood that the state official will employ his supervisory powers against Plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction."). *See also Shell Oil v. Noel,* 608 F.2d 208 (1st Cir. 1979); *Mendez v. Heller*, 530 F.2d 457 (2nd Cir. 1976). Numerous district courts have agreed. *Yniguez v. Mofford*, 730 F.Supp. 309, 311 (D. Ariz. 1990), *aff'd in part and rev'd in part, on other grounds*, 939 F.2d 727 (9th Cir. 1991), *cert. granted*, 116 S.Ct. 1316 (1996); *Akron Center for Reproductive Health v. Rosen*, 633 F.Supp. 1123, 1130 (N.D. Ohio 1986),

aff'd on other grounds, 854 F.2d 852 (6th Cir. 1988), *rev'd on other grounds*, 497 U.S. 502 (1990); *Gras v. Stevens*, 415 F.Supp. 1148, 1151 (S.D.N.Y. 1976); *Hatfield v. Williams*, 376 F.Supp. 212, 215 (N.D. Iowa 1974); *Coon v. Tingle*, 277 F.Supp. 304 (N.D. Ga. 1967).

Petitioners attempt to escape the weight of this authority by relying on two cases[2] where a court has found that *Ex Parte Young* does not require any conduct on the part of the defendant. The first is *Allied Artists Picture Corp. v. Rhodes*, 473 F.Supp 560 (S.D. Ohio 1979), *on reexamination*, 496 F.Supp. 408 (1980), *modified on other grounds*, 679 F.2d 656 (6th Cir. 1982). Obviously, *Allied* presents at most an intra-circuit conflict, not an inter-circuit

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[2]Petitioners also mistakenly claim that *Shell Oil* supports them. In *Shell Oil*, the First Circuit acknowledges that "the mere fact that an attorney general has a duty to prosecute all actions in which the state is interested" is not enough to make him a proper defendant in such action. 608 F.2d at 211. The issue was whether the Attorney General was indeed sufficiently connected and authorized to enforce the statute. The court found that issue to be undecided under state law, and declined to speculate on it. 608 F.2d at 212. The court did not hold that the Attorney General was a proper defendant.

conflict. More importantly, the issue presented in *Allied* -- whether a plaintiff can be completely foreclosed from obtaining any federal review of an allegedly unconstitutional statute -- is not presented here. In *Allied*, plaintiffs were attempting to enforce a statute that had no enforcement mechanism, and therefore, there was no state official connected to its enforcement. Had the Governor been allowed to assert his Eleventh Amendment immunity successfully, the statute could not have been reviewed in federal court. *Allied*, 679 F.2d at 665 n. 5.

Allied is distinguishable from the present case because in this instance, the local prosecutors are the state officials with plenary enforcement authority over the statutes at issue.[3] *See Children's Healthcare Is A Legal Duty v. Montgomery*, 92 F.3d 1412, 1416 (6th Cir. 1996); Pet. App. at 10a. Notably,

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[3]Petitioners are incorrect in suggesting that because they challenge an exemption to a criminal statute, the statute is "self enforcing." If a child were endangered and a prosecutor refused to bring an action because of this exemption, the prosecutor would be enforcing the exemption. Criminal statutes simply are not "self enforcing."

however, Petitioners have failed to challenge the district court's dismissal of the county and city prosecutor, and therefore, they are no longer defendants in this case. Thus, foreclosure of federal review results not from anything the Attorney General has done and not from the Sixth Circuit's correct analysis of *Ex Parte Young*, but from Petitioners' failure to cross-appeal the district court's decision.[4]

The second case relied on by Petitioners to demonstrate a split of authorities with regard to the correct interpretation of *Ex Parte Young* is *Doe v. Bolton*, 319 F.Supp. 1048 (N.D. Ga. 1970), *aff'd*, 410 U.S. 179 (1973). In *Doe*, the district court found that the State Attorney General's general law enforcement duties were a sufficient basis under *Ex Parte Young* to justify federal court

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[4]Moreover, Petitioners may always seek review of the validity of the statute in state court, which is fully capable of adjudicating federal constitutional rights. *Stone v. Powell*, 428 U.S. 465, 495 n. 35 (1976). And because Ohio has an appellate review which culminates in the Ohio Supreme Court, whose decisions are binding on the entire state, there is no need to sue separately in 88 counties.

jurisdiction. This finding was not a prerequisite for federal jurisdiction, however, as a local district attorney was also a party. Moreover, the *Ex Parte Young* issue was not raised in the appeal to this Court, and therefore, was not addressed in this Court's decision. The district court's decision is against the weight of the more recent precedents cited above. This single case, which at most creates a lopsided split of authority, simply does not present a conflict meriting review by this Court.

III. PETITIONERS LACK ARTICLE III STANDING.

The Writ should also be denied because Petitioners lack standing. In order to establish standing, Petitioners must demonstrate: (1) a concrete injury in fact; (2) a causal connection between the injury and Defendant's conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *United States v. Hayes*, ___ U.S. ____, 115 S.Ct. 2431, 2435 (1995); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). In the instant case,

Petitioners lack standing because the statute does not cause a concrete injury connected to the conduct of the Attorney General. *See Children's Healthcare*, 92 F.3d at 1420-25 (6th Cir. 1996) (Batchelder, J., concurring); Pet. App. at 17a-29a.

As Judge Batchelder correctly found, the only possible injury to Petitioners is that they may not be provided adequate medical care. *Children's Healthcare*, 92 F.3d at 1492; Pet. App. at 24a. This alleged injury is not, however, causally related to the conduct of the Ohio Attorney General, or even to the existence of the statute. Nor is a favorable decision likely to redress the alleged injury. In fact, this injury, if it exists at all, is traceable only to the parents or guardians of the affected children. In asserting that the alleged lack of care is a result of a statutory exemption, Petitioners are asking this Court to speculate about the motivations of persons not even a party to this suit. It is not, for instance, unreasonable to conclude that these persons'

conduct is guided not by the statute, but by their religion. If such is the case, the alleged injury is not traceable to the conduct Petitioners seek to have declared unconstitutional, nor would such a declaration remedy the alleged injury.

Petitioners also allege that their constitutional rights are violated because the statute prevents prosecution of their parents if their parents withhold medical treatment for spiritual reasons. This is not an "injury in fact" under Article III. Neither Petitioners nor anyone else has a right to have another person prosecuted for a crime. *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973); *Diamond v. Charles*, 476 U.S. 54 (1986). *See also*, *Children's Healthcare*, 92 F.3d at 1422 n. 5; Pet. App. at 23a, n. 5. Thus, even if Petitioners are potential victims of an unconstitutional statute, they have no right to have their assailants prosecuted, as distinct from any remedial right they may have against their assailants. Therefore, the State's lack of prosecution of this class of potential defendants cannot

invade a "legally protected interest," *Lujan*, 504 U.S. at 560-61, and cannot rise to the level of injury in fact.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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No. 96-991

In the

Supreme Court of the United States

October Term, 1996

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC.; STEVEN M. BROWN; EVE BROWN; and HILLARY BROWN; and on behalf of a class of children in the State of Ohio similarly situated,

Petitioners,

vs.

BETTY D. MONTGOMERY,
Attorney General of Ohio,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Sixth Circuit has introduced a red herring into this Court's Eleventh Amendment jurisprudence. The decision below holds that the government must attempt to enforce an unconstitutional statute before an *Ex parte Young*[1] action will lie. As Petitioners have demonstrated (and Respondent does not contest), this requirement cannot be met when the suit challenges the constitutionality of an exemption. In such cases, government action is explicitly precluded by the terms of the exemption. The effect of the Sixth Circuit's decision is to unilaterally provide that any suit challenging the constitutionality of an exemption from the protection of state law (such as *Romer v. Evans*, 517 U.S. _, 116 S.Ct. 1620 (1996)) must be brought in the state courts. This result is contrary to precedent and would have far reaching implications.

As shown in the record in the district court, many lives have already been lost due to religiously based child neglect. If the federal courts are unable to act and the children are consigned to the unrealistic remedy of commencing 88 separate state court actions in Ohio alone, more lives will be lost or condemned to defect or disability. The Ohio exemption permits parents to deny their children needed medical treatment. The withdrawal of state criminal law protection from the petitioners, facially denies the constitutional rights of these children to Equal Protection and Due Process, and discriminates on the basis of religion. The federal courts must remain open to resolve these important constitutional issues.

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[1] 209 U.S. 123 (1908).

I. THE ACTION/INACTION DISTINCTION IS SPECIOUS.

Petitioners showed in their Petition for Certiorari that the action/inaction distinction for the application of *Young*, drawn by the decision below, is contrary to the decisions of this Court. No such requirement can fairly be imposed in cases where the basis for the suit is official inaction, or where the suit challenges the constitutionality of an exemption. See Pet. 19 - 20. The Respondent apparently concedes the point, because there is no attempt in the Brief in Opposition to distinguish, or even discuss *Edelman v. Jordan*, 415 U.S. 651 (1974), *Hutto v. Finney*, 437 U.S. 678 (1978), or *Quern v. Jordan*, 440 U.S. 113 (1973), which hold that a government official's inaction may be prospectively enjoined under *Young*. See also *Milliken v. Bradley*, 433 U.S. 266, 290 (1977).

More significantly, Respondent does not and cannot refute the argument that unconstitutional state action can never be demonstrated in suits involving an exemption. The exemption, by its terms, prohibits state action. The effect of the exemption is to withdraw a class of persons from the protection of the law. As in *Romer*, such laws are enforced through state inaction. State inaction is, in fact, the only lawful state response to parental endangerment of Petitioners. To impose a state action requirement upon Petitioners as a condition prerequisite to the application of *Young* is monstrous. It asks the impossible of Petitioners, and in effect, consigns their suits and all other similarly situated to the state courts. The record below establishes that the state courts have requested relief from such consignment.[2]

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[2] Mercer County, Ohio, Common Pleas Judge Dean James, pleaded for correction of the effects of this statute: "It is the hope of this Court that these types of cases will not have to be pursued by the prosecution in the remaining eighty-six counties." *State v. Miller*, slip op. 86-CRM-30,

Respondent recites *obiter dicta* from the decisions of this court in *Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992) and others. Brief in Opp., at 5 - 6. Such citations are unconvincing because the harm occurred by government official action, and not by government official inaction, as this case presents. Here the inaction clearly results in harm, by allowing and encouraging neglect of a particular group of children, and more immediately by treating these children as second-class citizens, less worthy of the state's protection. This Court has not indicated any intention to abandon the principle announced in *Edelman* that official inaction which causes harm may be enjoined under *Young*.

Respondent offers only the bare tautology that without requirements both of a connection between the state official and the statute, and action under it, "the Eleventh Amendment would offer no immunity protection to state officials such as the Attorney General." Brief in Opp., at 4. In response, it obvious that the whole point of *Young is* to withdraw immunity protection from state officials, as the only way to enforce the supremacy of the Fourteenth Amendment. The *Young* decision itself repeatedly eschews the action requirement in its analysis, stating: the official must have "some connection with the enforcement of the act, *Ex parte Young*, at 157; "[t]he fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact," *id.*, at 157; the relevant question is whether he has "any duty with regard to the enforcement of the same," *id.*, at 160; and "[h]is power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party, *id.*, at 161.

Mercer County Com. Pl., Apr. 27, 1987. (See attachment to Complaint, R. 1.)

Respondent concedes her important connection to enforcement of the criminal laws of Ohio. Brief in Opp., at 5, n.1. This concession is fatal to Respondent's position because that connection is sufficient for the invocation of the *Young* exception. It should be noted that Respondent suggests that the local prosecutors for Hamilton County and the City of Cincinnati would be "appropriate" parties under the *Young* exception.[3] Brief in Opp., at 2, 11. As the Petitioner has shown in the Petition, and Respondent has not disputed, both the Attorney General and the local prosecutors have identical concurrent authority as criminal prosecutors to enforce the challenged statutes. See Petition, at 4. Therefore, if the local prosecutors are proper parties to be enjoined under the *Young* exception, so is the Respondent.

Respondent's claim that the decision conforms to the vast majority of lower court authority is also unconvincing. The Respondent's reliance on a string of cases construing civil statutes in which the attorney general had no enforcement authority, is misplaced. See Brief in Opp., at 8 - 10. The decision below directly conflicts not only with *Young* and *Edelman*, but also with the only two court decisions holding that an attorney general is a proper *Young* defendant in a challenge to a criminal statute: *Doe v. Bolton*, 319 F.Supp. 1048 (N.D. Ga. 1970), *aff'd*, 410 U.S. 179 (1973) and *Shell Oil v. Noel*, 608 F.2d 208 (1st Cir. 1979).[4] There is no known

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[3] It should be noted as well that those two local prosecutors have a connection to only a small number of the class of petitioners, whereas the Attorney General with state-wide jurisdiction is connected to the entire class.

[4] Respondent's claim that *Shell Oil* does not support the petitioner's position is frivolous. The court stated

> "Were the Rhode Island court to apply to [the statute], the federal doctrine announced in *In re Debs*, or were it to hold that

court decision holding that a criminal prosecutor is not a proper *Young* defendant in a suit challenging a criminal statute.

In addition, Respondent does not dispute that *Steffel v. Thompson*, 415 U.S. 452 (1974) and *Perez v. Ledesma*, 401 U.S. 82 (1971) hold that the Declaratory Judgments Act was intended to relieve plaintiffs of the burden of establishing the prerequisites to injunctive relief under *Young* such as action or threat of action. The feebleness of the response is further reason why this court should grant review to correct the decision below.

II. PETITIONERS HAVE ARTICLE III STANDING.

Respondent cites the separate opinion of Justice Batchelder, which could not garner a single supporting vote, as authority for her claim that petitioners lack standing. Like the contractors in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, __U.S.__, 113 S.Ct. 2297, 2303 (1993), who

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> [the statute] gave the Attorney General *ex officio* a **right to enforce** [the statute]--a point on which we express no opinion--then it seems to us that at least the Attorney General if not the Governor would be a proper party defendant in this case." *Id.*, at 212 (emphasis added).

The court went on to state that the attorney general's relation to a criminal statute is

> "of a different order of magnitude with respect to public policy than a statute which determines the right of one person to recover from another, or sets the jurisdictional requirements for divorce, or governs the custody of a child, or enables a local authority to grant a license." *Id.*

were denied an opportunity to compete for city contracts, petitioners have asserted an injury in fact based upon their inability to compete for the state's prosecutorial resources. Respondent mischaracterizes this claim as "a right to have another person prosecuted for a crime." Brief in Opp., at 15. Petitioners assert no such right. They merely claim, as did the plaintiffs in *Romer*, that they are entitled to have an equal claim on the state's prosecutorial resources, and that they should not be arbitrarily excluded from the state's protection on the basis of religion. Respondent has offered no plausible counter to this argument.

Respondent's claim that *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) is authority for lack of "injury in fact," is frivolous. This Court held that plaintiff in *Linda R.S.* had stated an injury in fact but not a nexus between the injury and the prosecutor's policy. Petitioners have provided a convincing record below in affidavits from an Ohio criminal prosecutor and others, that the existence of the statute encourages medical neglect among religious believers, a nexus sufficient under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The Respondent's argument that "any harm is the result of private conduct" turns a blind eye to the role the state has chosen to play by enacting the discriminatory statute.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

Dated: February 5, 1997

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